95-1712

Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1995

INVESTORS EQUITY LIFE HOLDING COMPANY,
Petitioner,

v.

WAYNE C. METCALF, INSURANCE COMMISSIONER OF THE STATE OF HAWAII, AND INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of the State of Hawaii erred in holding that the sole shareholder of a Hawaii insurer has no standing to oppose a petition by the State's Insurance Commissioner to liquidate the insurer, despite the shareholder's assertion that an involuntary liquidation of the insurer would violate the shareholder's right under the United States Constitution not to be deprived of its property without due process of law.

STATEMENT REGARDING THE PARTIES AND PETITIONER'S CORPORATE AFFILIATES

The caption of this case contains the names of all the parties to the appeal before the Supreme Court of the State of Hawaii.1/ Although the Hawaii Life and Disability Insurance Guaranty Association ("Hawaii Guarantee Association") was not named as a party in the state court action, it exercised its statutory authority and participated in the proceedings before both the circuit court and Hawaii Supreme Court. *See* HAW. REV. STAT. § 431:16–208(l) (1987).2/

Pursuant to Supreme Court Rule 29.6, Petitioner Investors Equity Life Holding Company states that it has no parent company or nonwholly owned subsidiaries.3/

1/ Lawrence M. Reifurth ("Reifurth") served as the Insurance Commissioner of the State of Hawaii when the subject rehabilitation and liquidation proceedings were commenced in the state circuit court. The rehabilitation and liquidation petitions were brought in Reifurth's name, in his capacity as Insurance Commissioner, in accordance with HAW. REV. STAT. §§ 431:15–301 and 431:15–305 (1987). Reifurth's successor in office, Wayne C. Metcalf, automatically was substituted as the petitioner in the state proceedings, *see* Haw. R. App. P. 43(c)(1), and is named as a Respondent in the case before this Court.

2/ The Hawaii Guarantee Association is a nonprofit legal entity created by the Hawaii Insurance Code. HAW. REV. STAT. § 431:16–206 (1987).

3/ Respondent Investors Equity Life Insurance Company of Hawaii, Ltd. is a wholly owned subsidiary of Petitioner Investors Equity Life Holding Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Investors Equity Life Holding Company ("IELHC") respectfully requests that this Court exercise its jurisdiction to review the judgment entered in this case by the Supreme Court of the State of Hawaii. The Hawaii Supreme Court dismissed, for lack of standing, IELHC's appeal from a Hawaii circuit court's judgment and order granting the Respondent Insurance Commissioner's petition to liquidate IELHC's wholly owned subsidiary, Investors Equity Life Insurance Company of Hawaii, Ltd. ("IEL"), pursuant to Hawaii's Insurers Supervision, Rehabilitation and Liquidation Act, HAW. REV. STAT. §§ 431:15–101 to 431:15–411 (1987) ("Rehabilitation and Liquidation Act").

OPINIONS BELOW

The opinion by the Supreme Court of the State of Hawaii dismissing IELHC's appeal for lack of standing is reported as *Metcalf v. Investors Equity Life Insurance Co. of Hawaii, Ltd.*, 910 P.2d 110 (Haw. 1996), and is reproduced as Petitioner's Appendix A. The Hawaii Supreme Court's Notice and Judgment on Appeal, which was entered in accordance with the aforementioned opinion, is reproduced as Petitioner's Appendix B.

The circuit court's Findings of Fact, Conclusions of Law, and Order granting the Insurance Commissioner's petition to liquidate IEL is reproduced as Petitioner's Appendix C. The circuit court's Judgment thereon, from which IELHC appealed to the Hawaii Supreme Court, is reproduced as Petitioner's Appendix D.

The following orders of the circuit court also are relevant to this Petition and accordingly are included as

appendices hereto: (1) Seizure Order, filed June 22, 1994, (Pet'r's App. E); (2) Order to Show Cause, filed June 22, 1994, (Pet'r's App. F); (3) Stipulated Rehabilitation Order, filed June 24, 1994, (Pet'r's App. G); (4) Stipulation to Allow Intervention of Investors Equity Life Holding Company and Order, filed August 10, 1994, (Pet'r's App. H); and (5) Disposition of Motion/Matter Taken Under Advisement, filed September 22, 1994, (Pet'r's App. I).

JURISDICTION

The Supreme Court of the State of Hawaii issued its opinion dismissing IELHC's appeal on January 11, 1996, and subsequently entered its Notice and Judgment on Appeal on January 24, 1996. This Petition is timely filed under Supreme Court Rule 13.

IELHC invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) (1993). Pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(b)–(c), IELHC states that neither 28 U.S.C. § 2403(a) (1993) nor 28 U.S.C. § 2403(b) (1993) applies to this Petition.

APPLICABLE CONSTITUTIONAL PROVISION AND STATE STATUTES

The constitutional provision involved in this case is Section 1 of the Fourteenth Amendment to the United States Constitution, which states in part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Relevant provisions of the Hawaii Rehabilitation and Liquidation Act are reproduced in Petitioner's Appendix J. Other provisions of the Hawaii Insurance Code cited in this Petition are reproduced in Petitioner's Appendix K.

- STATEMENT OF THE CASE

This case arises out of the Respondent Insurance Commissioner's seizure and subsequent liquidation of IEL, an insurance company incorporated and licensed under the laws of the State of Hawaii since 1963. Petitioner IELHC purchased all of the authorized, issued, and outstanding shares of IEL's stock in 1991, in accordance with the terms of a Confidential Regulatory Agreement between the Insurance Commissioner and IELHC. As a result, IELHC is the parent company and sole shareholder of IEL.

When IEL became insolvent in 1994, the Insurance Commissioner commenced delinquency proceedings and obtained an order allowing for the seizure of IEL's property, books, accounts, documents, and other records. The Insurance Commissioner initially planned to rehabilitate IEL, and IELHC supported that effort by entering into a Stipulated Rehabilitation Order with the Insurance Commissioner. Shortly thereafter, however, the Insurance Commissioner abandoned the rehabilitation alternative and instead filed a petition to liquidate IEL.

Upon the unqualified stipulation of the Insurance Commissioner, which was made an order of the Hawaii circuit court, IELHC intervened in the case as a party respondent. The circuit court imposed no limitations on

IELHC's participation in the proceedings. As a party to the action, IELHC petitioned the circuit court for approval of its own plan to rehabilitate IEL and simultaneously opposed the Insurance Commissioner's petition for liquidation. The court held a series of hearings on the parties' respective petitions, but never conducted a full evidentiary hearing concerning the appropriateness of the requested relief. The court ultimately denied IELHC's petition for approval of its rehabilitation plan and, over IELHC's objections, granted the Insurance Commissioner's petition for liquidation.

IELHC appealed the matter to the Supreme Court of the State of Hawaii, raising two primary points of error: (1) the lower court's findings of fact and conclusions of law were based on insufficient evidence in the record; and (2) the lower court denied IELHC its constitutional right to due process by failing to conduct a full evidentiary hearing on the Insurance Commissioner's petition to liquidate IEL. The Hawaii Supreme Court dismissed IELHC's appeal for lack of standing to oppose the Insurance Commissioner's liquidation petition, without reaching the merits of IELHC's substantive arguments. In reaching the conclusion that IELHC lacked standing to oppose the liquidation petition, the Hawaii Supreme Court looked solely to the language of the Hawaii Rehabilitation and Liquidation Act. The Hawaii Supreme Court failed to address IELHC's assertion of standing based on its constitutional right to due process.

The question presented to this Court is whether the Hawaii Supreme Court erred in holding that IELHC had no standing to oppose the Insurance Commissioner's petition to liquidate IEL, IELHC's wholly owned subsidiary, despite IELHC's assertion that the involuntary liquidation of the insurer would violate IELHC's right under the United States

Constitution not to be deprived of its property without due process of law.

A. Insurance Commissioner's Petition for Seizure and Rehabilitation of IEL

On June 22, 1994, the Insurance Commissioner filed a Petition for an *Ex Parte* Seizure Order Pursuant to [HAW. REV. STAT.] § 431:15–202 and for Rehabilitation of a Domestic Insurer Pursuant to [HAW. REV. STAT.] § 431:15–301 ("Petition for Seizure and Rehabilitation") in the Hawaii circuit court. The Petition for Seizure and Rehabilitation was supported by the affidavits of the Insurance Commissioner, Lawrence M. Reifurth, and the Chief Examiner of the Hawaii Division of Insurance ("Insurance Division"), Timothy P. Bogan. As grounds for the Petition for Seizure and Rehabilitation, Reifurth and Bogan attested, *inter alia*, that IEL was insolvent and in such condition that the further transaction of business by the company would be financially hazardous to its policyholders, creditors, and the public. *See* HAW. REV. STAT. § 431:15–301(a)(1)–(2). In accordance with the rehabilitation statute, however, Reifurth also stated that he reasonably believed IEL could be successfully rehabilitated without substantial increase in the risk of loss to those same persons. *See* HAW. REV. STAT. § 431:15–301(a).

The circuit court immediately entered two orders in relation to the Petition for Seizure and Rehabilitation. The circuit court issued a Seizure Order authorizing the Insurance Commissioner to take possession and control of IEL's property, books, accounts, documents, and other records, pursuant to HAW. REV. STAT. § 431:15–202, upon finding that grounds existed for formal delinquency proceedings and that any delay would endanger the rights of the

policyholders, creditors, and the public. (Pet'r's App. E.) The circuit court also issued to IEL an Order to Show Cause why the court should not enter a rehabilitation order upon the grounds asserted in the Insurance Commissioner's petition. (Pet'r's App. F.)

IEL and IELHC supported the Insurance Commissioner's decision to rehabilitate the company and, as a result of the parties' combined effort, the circuit court entered a Stipulated Rehabilitation Order only two days after the issuance of its Seizure Order and Order to Show Cause. (Pet'r's App. G.) Pursuant to the Stipulated Rehabilitation Order, and in accordance with the applicable provisions of the Rehabilitation and Liquidation Act, the circuit court authorized and directed the Insurance Commissioner and his successors in office to take possession of IEL's assets and administer the same under the general supervision of the court. (*See id.*) *See* HAW. REV. STAT. § 431:15–302(a). The presidents of both IEL and IELHC approved and signed the Stipulated Rehabilitation Order.

B. Insurance Commissioner's Petition for Liquidation and IELHC's Petition for Approval of Its Own Rehabilitation Plan

On August 5, 1994, just weeks after the circuit court entered the Stipulated Rehabilitation Order in accordance with the parties' agreement, the Insurance Commissioner abandoned his decision to rehabilitate IEL. The Insurance Commissioner instead filed a Petition for Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd. ("Petition for Liquidation"). The Petition for Liquidation, like the earlier Petition for Seizure and Rehabilitation, was supported by the affidavits of Insurance Commissioner Reifurth and Chief Examiner Bogan. Reifurth and Bogan

attested that it was appropriate to now liquidate IEL under the governing statutes because, *inter alia*: (a) the Insurance Division had examined the available financial statements of IEL; (b) based on that examination, IEL was insolvent; (c) the further transaction of business by IEL would be hazardous to its policyholders, creditors, and the public; and (d) any attempt to rehabilitate IEL would be futile and serve no useful purpose. *See* HAW. REV. STAT. §§ 431:15–301, –306.

IELHC, in order to protect its interest in IEL, sought to intervene in the proceedings before the circuit court. The Insurance Commissioner had no objection and, on August 10, 1994, stipulated to IELHC's intervention in the case. (*See* Pet'r's App. H.) As an intervenor in the action, IELHC immediately filed its Petition for Approval of Intervenor's Plan of Rehabilitation of Investors Equity Life Insurance Company of Hawaii, Ltd. ("IELHC's Petition for Approval of Rehabilitation Plan"). IELHC's rehabilitation plan contemplated the infusion of significant real estate holdings and other assets into IEL, such that the financial deficiencies identified by the Insurance Commissioner would be eliminated.

IELHC also filed its answer to the Insurance Commissioner's petition to liquidate IEL. IELHC's answer stated, *inter alia*, that an order granting the Insurance Commissioner's liquidation petition, without affording IELHC an opportunity to present evidence in opposition to the petition at a full evidentiary hearing, would violate its due process and other rights under the United States and Hawaii Constitutions.

C. Consolidated Hearings on Petitions

The circuit court set both the Insurance Commissioner's Petition for Liquidation and IELHC's Petition for Approval of Rehabilitation Plan for hearing on August 15, 1994. Counsel for the Insurance Commissioner and IELHC argued the merits of the liquidation and rehabilitation petitions, but neither side presented any witness testimony or other evidence at the hearing. Observing that the parties' respective positions were directly at odds, and noting the various, significant interests at stake, the court instructed counsel to explore the possibility of a compromise before it entered a ruling on either petition. The circuit court therefore took the matter under submission and continued the hearing until the next day.

On August 16, 1994, the parties entered into a stipulation which, in effect, maintained the status quo while the Insurance Commissioner reviewed IELHC's rehabilitation plan. As a practical matter, although the Insurance Commissioner maintained that he had the sole discretion to prepare and present a plan to rehabilitate IEL, he agreed to seriously study IELHC's rehabilitation plan before pursuing an involuntary liquidation. As a result, the circuit court again continued the hearing on the petitions for rehabilitation and liquidation, this time until September 2, 1994.

When the circuit court reconvened the consolidated hearing on the petitions for rehabilitation and liquidation on September 2, 1994, counsel for the Insurance Commissioner informed the court that, in the Insurance Commissioner's opinion, IELHC's proposed rehabilitation plan was not a viable method of curing IEL's insolvency. In the Insurance Commissioner's view, the only solution was to liquidate

IEL. Once again, however, the Insurance Commissioner provided no testimony or other evidence in support of his liquidation petition, other than the previously submitted affidavits. IELHC specifically objected to the proceedings on due process and evidentiary grounds.

Similarly, at another continuation of the consolidated hearing, on September 6, 1994, IELHC again requested a full evidentiary hearing on the merits of the liquidation and rehabilitation petitions. IELHC also requested that the court approve a procedure whereby the holding company could present a plan of rehabilitation and receive a formal response from the Insurance Commissioner. The Insurance Commissioner, for his part, generally opposed each of IELHC's requests. The circuit court, recognizing the complexity of the matter and the divergence of the parties' respective positions, thus ordered the parties to brief the following issues: (1) whether the court was required to conduct an evidentiary hearing on the liquidation and rehabilitation petitions; (2) the showings required in relation to the respective petitions; and (3) which parties had standing to participate in those proceedings. The court further continued the consolidated hearing in order to consider the parties' submissions.

IELHC tendered a supplemental memorandum, in accordance with the circuit court's instructions, on September 13, 1994. IELHC squarely addressed the standing issue identified by the circuit court, and presented for review to this Court, as follows:

> As the sole shareholder of [IEL], [IELHC] has a significant property right that warrants protection and that guarantee[s] the Holding Company a due process right to be

> heard. A substantial interference with a stockholder's property rights constitutes a deprivation of property without due process (and without just compensation).
>
> Because the Commissioner's action will substantially affect the Holding Company's shareholder interest in [IEL], fundamental due process of law confers standing upon the Holding Company to contest liquidation and advocate rehabilitation.
>
> . . . .
>
> . . . It is both unconstitutional and disingenuous of the Commissioner to deny the Holding Company or other parties standing under these circumstances. It is especially bizarre when the Commissioner seeks to exclude the Holding Company from even participating, by advocating a plan of rehabilitation, but then to turn around and argue that the Holding Company has failed to present sufficient evidence to support its plan of rehabilitation.

(Intervenor [IELHC's] Supplemental Mem. Re: Constitutional and Statutory Requirements for Hr'g on Rehabilitation or Liquidation of Resp't [IEL] at 38–40 [filed Sept. 13, 1994] [citations and footnotes omitted].)

On September 19, 1994, the circuit court reconvened the consolidated hearing on the two petitions. Without hearing any testimony or taking other evidence, the court denied IELHC's Petition for Approval of Rehabilitation Plan. The court took the Insurance Commissioner's Petition

for Liquidation under advisement, indicating that it would soon inform the parties of its ruling.

Shortly thereafter, on September 22, 1994, the circuit court issued a minute order granting the Insurance Commissioner's liquidation petition and requiring the parties to submit proposed findings of fact and conclusions of law, or objections to the issuance of the same, as appropriate. (*See* Pet'r's App. I.) The Insurance Commissioner submitted his proposed Findings of Fact, Conclusions of Law, and Order on November 14, 1994. IELHC submitted its objections thereto on December 5, 1994. The circuit court ultimately rejected IELHC's objections and, on December 29, 1994, entered its Findings of Fact, Conclusions of Law, and Order in the form submitted by the Insurance Commissioner.

D. The Circuit Court's Findings of Fact, Conclusions of Law, and Order

The circuit court's findings of fact related both to the grounds for liquidating IEL and the merits of IELHC's rehabilitation plan. In particular, in relation to the Insurance Commissioner's liquidation petition, the court found: (1) IEL was insolvent; (2) IEL failed to timely file certain financial reports; (3) any delay in the delinquency proceedings would cause harm to IEL's policyholders and creditors; and (4) any attempt to rehabilitate IEL would be futile or serve no useful purpose. (*See* Pet'r's App. C at C–6, ¶¶ 11–13.) With respect to IELHC's rehabilitation plan, the circuit court found that the present value of the income associated with the assets to be infused in IEL would not cure the insolvency. (*See id.* at C–9, ¶¶ 23–24.) The court also found, over IELHC's specific objection, that the record failed to establish that IELHC's rehabilitation plan would

"eliminate completely the alleged insolvency of [IEL], cause all existing policyholders to be fully paid, and make sufficient funds available to satisfy all claims of creditors, . . . and restore [IEL] to a viable going concern." (*See id.* at C–9 through C–10, ¶ 25.)[4/]

Notwithstanding the entry of the foregoing findings of fact, which went directly to the merits of the parties' respective submissions, the circuit court proceeded to address the question of IELHC's standing to participate in the proceedings in the first instance. The following conclusions of law are particularly relevant to the standing issue:

> 2. [The Rehabilitation and Liquidation Act] does not recognize the right of a shareholder of an insurance company or any person other than the Insurance Commissioner to seek approval of a plan of rehabilitation of an insurance company.
>
> . . . .
>
> 6. With regard to the power to submit a plan of rehabilitation of an insurer, [the Rehabilitation and Liquidation Act]

4/ IELHC specifically objected to this finding on the ground that, "[t]he Court held no evidentiary hearing on the IELHC Rehabilitation Plan, having decided that IELHC had no standing to propose it. Thus, this Finding is improper, as there was no opportunity to develop a factual record relating to the Rehabilitation Plan." (Intervenor [IELHC's] Objections to Proposed Findings of Fact, Conclusions of Law and Order at 3, ¶ 25 [filed Dec. 5, 1994] [hereinafter IELHC's Objections].)

> specifically limits that power to the Insurance Commissioner. . . .
>
> 10. Pursuant to [HAW. REV. STAT.] § 431:15--305, the "court shall permit the directors of the insurer to take such actions as are reasonably necessary to defend against the [liquidation] petition . . . ." Thus, while the directors of IEL are permitted to object to a petition for liquidation, there is no authority for shareholders, policyholders, or creditors to intervene in the proceeding to challenge the discretionary authority of the Insurance Commissioner to implement a plan of liquidation. . . .
>
> . . . .
>
> 12. This Court concludes that, consistent with the foregoing, IELHC has no standing to submit a plan of rehabilitation to this Court. Notwithstanding this conclusion, IELHC has been afforded a full opportunity to present its position in this proceeding and its submissions have been considered, without regard to its lack of standing.

(Pet'r's App. C at C–10 through C–16, ¶¶ 2, 6, 10, 12.)[5/] By and through its findings and conclusions, therefore, the circuit court held that IELHC, IEL's parent company and sole shareholder, had no standing to present a rehabilitation

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5/ IELHC specifically objected to the conclusions of law set forth in paragraphs 6, 10, and 12. (IELHC's Objections at 4, ¶¶ 6, 10, 12.)

plan designed to cure the insurer's insolvency and contemporaneously oppose the Insurance Commissioner's liquidation petition. Accordingly, the circuit court declared IEL insolvent, denied IELHC's Petition for Approval of Rehabilitation Plan, and reaffirmed its decision to grant the Insurance Commissioner's Petition for Liquidation. IEL is now in the process of being liquidated.

E. IELHC's Appeal to the Hawaii Supreme Court

IELHC appealed the circuit court's judgment directly to the Supreme Court of the State of Hawaii. The holding company asserted two points of error on appeal: (1) there was insufficient evidence in the record to support the circuit court's Findings of Fact, Conclusions of Law, and Order denying IELHC's Petition for Approval of Rehabilitation Plan and granting the Insurance Commissioner's Petition for Liquidation; and (2) the circuit court deprived IELHC of its due process rights under the United States and Hawaii Constitutions by failing to conduct a full evidentiary hearing prior to ordering the liquidation of IEL, its wholly owned subsidiary.

In its opening brief, IELHC specifically restated the constitutional basis for its standing to challenge the Insurance Commissioner's liquidation petition:

> [IELHC] is the parent and sole shareholder of IEL and therefore has a definite, clear, and undeniable property interest in IEL. [IELHC] also has a vital . . . property interest in the monies and assets of IEL. Therefore, [IELHC] is entitled to the full constitutional guarantees of an opportunity for notice and opportunity to participate in a meaningful

> manner prior to being deprived of its property by the State.

(Opening Br. of Intervenor/Resp't–Appellant at 20 [filed May 17, 1995].) Similarly, IELHC argued that it had standing to challenge the Insurance Commissioner's action as follows:

> [D]ue process requires that [the creditors, policyholders, shareholders, members and all other persons interested in IEL's assets] must have notice and a full and fair opportunity to be heard. Clearly, such persons include [IELHC], whose interests are vitally affected by having the property in the form of its wholly owned subsidiary confiscated through liquidation without a full trial. But the breadth of standing under the Due Process Clause is as great as the interests to be affected . . . . Therefore, all of those who have such an interest have a right to be heard.
>
> . . . .
>
> The Commissioner's action substantially affects [IELHC's] shareholder interest in IEL. Fundamental due process of law confers standing upon [IELHC] to contest liquidation and advocate rehabilitation.

(*Id.* at 33–34 [footnote omitted].)

The Insurance Commissioner and the Hawaii Guarantee Association each argued, in their respective answer briefs, that the circuit court's decision should be

affirmed in all respects. Their argument, as a general matter, was twofold: (1) IELHC lacked standing to submit a rehabilitation plan or oppose the liquidation petition in the first instance; and (2) even if IELHC had standing, the holding company's substantive arguments were without merit. (*See* Answer Br. of Intervenor-Appellee [Hawaii Guarantee Ass'n] at 13–31 [filed June 28, 1995] [hereinafter Hawaii Guarantee Ass'n's Answer Br.]; Answer Br. of Pet'r-Appellee Wayne C. Metcalf, Insurance Commissioner of the State of Hawaii at 24–35 [filed June 28, 1995] [hereinafter Insurance Comm'r's Answer Br.].) The standing challenge, however, was limited in scope. The Hawaii Guarantee Association relied almost exclusively on the language of the State's Rehabilitation and Liquidation Act, giving only cursory attention to IELHC's assertion of a constitutional basis for standing. (Hawaii Guarantee Ass'n's Answer Br. at 17–18.) The Insurance Commissioner, for his part, ignored IELHC's constitutional argument altogether, and further argued that the stipulation allowing IELHC's intervention had no bearing on the question of standing. (Insurance Comm'r's Answer Br. at 28.)

On January 11, 1996, the Hawaii Supreme Court issued its *per curiam* opinion on IELHC's appeal from the circuit court's judgment. The supreme court recognized IELHC's substantive arguments concerning insufficiency of the evidence and lack of due process but, in the same breath, stated that it was unnecessary to reach the merits of either contention. According to the supreme court, IELHC lacked standing to oppose the liquidation petition, notwithstanding the circuit court's August 10, 1994 order approving the Insurance Commissioner's stipulation to allow IELHC to intervene in the delinquency proceedings. In reaching its conclusion, however, the Hawaii Supreme Court looked

solely to the language of the State's Rehabilitation and Liquidation Act and, like the circuit court, determined that the statutory scheme did not permit a shareholder to challenge the Insurance Commissioner's liquidation petition. The Hawaii Supreme Court's six-page opinion makes no reference to IELHC's argument that it had standing to oppose the liquidation petition by virtue of its constitutional right not to be deprived of property without due process of law.

On January 24, 1996, the Hawaii Supreme Court entered judgment in accordance with its written opinion dismissing IELHC's appeal for lack of standing. This Petition for a Writ of Certiorari followed.

REASON FOR GRANTING THE WRIT

IELHC's Constitutional Right to Due Process Provides the Holding Company with Standing to Oppose the Commissioner's Liquidation Petition

A. Standing

The narrow issue presented to this Court for review is whether the Hawaii Supreme Court erred in holding that IELHC lacked standing to oppose the Insurance Commissioner's petition to liquidate IEL. Although the standing inquiry in the federal courts stems from the "case or controversy" requirement imposed by Article III of the United States Constitution, the jurisdiction of the Hawaii state courts is not subject to a constitutional limitation. *Life of the Land v. Land Use Comm'n*, 623 P.2d 431, 438 (Haw. 1981). The Hawaii Supreme Court has determined, nevertheless, that "judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of

judicial resolution and presented in an adversary context." *Id.* (citing *Reliable Collection Agency, Ltd. v. Cole*, 584 P.2d 107, 111 (Haw. 1978)). Even in the absence of constitutional restrictions, moreover, "courts still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting . . . ." *Id.; see Warth v. Seldin*, 422 U.S. 490, 498 (1975) (This "prudential limitation" on the exercise of a court's jurisdiction, like the Article III "constitutional limitation," "is founded in concern about the proper—and properly limited—role of the courts in a democratic society.") (citations omitted). In short, even in the Hawaii state courts, "judicial intervention in a dispute is normally contingent upon the presence of a 'justiciable' controversy." *Life of the Land*, 623 P.2d at 438 (citations omitted).

"Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated." *Id.; see Hawaii's Thousand Friends v. Anderson*, 768 P.2d 1293, 1298 (Haw. 1989) (quoting *Life of the Land*, 623 P.2d at 438, with approval); *see also Pele Defense Fund v. Puna Geothermal Venture*, 881 P.2d 1210, 1213 (Haw. 1994) ("Standing is concerned with whether the parties have the right to bring suit.") (citation omitted). There is little question that a statute can confer standing on a party to challenge an action alleged to be wrongful. *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."). "Where the party does not rely on any specific statute authorizing invocation of the judicial process, [however], the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' as to ensure that 'the dispute sought to be adjudicated will be

presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (citations omitted); *see Life of the Land*, 623 P.2d at 438 (The critical inquiry in the standing determination is "whether the [complaining party] has 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of [the court's] jurisdiction and to justify exercise of the court's remedial powers on [its] behalf.") (quoting *Warth*, 422 U.S. at 498–99); *see also Hawaii's Thousand Friends*, 768 P.2d at 1298.

IELHC asserted that it had standing to oppose the Insurance Commissioner's liquidation petition on each of those grounds: (1) the Rehabilitation and Liquidation Act provided a statutory basis for IELHC's challenge; and (2) alternatively, the potential violation of IELHC's constitutional right to due process gave it a "personal stake in the outcome of the controversy," such that IELHC had standing regardless of what the statute provided. As discussed below, however, the Hawaii Supreme Court only addressed the former issue—whether the Rehabilitation and Liquidation Act conferred IELHC with standing. The court failed to address IELHC's assertion of standing on constitutional grounds.

B. The Hawaii Supreme Court's Resolution of the Standing Question Under the Rehabilitation and Liquidation Act

The Hawaii Supreme Court framed the dispositive issue in this case as "whether IELHC had standing to appear before the circuit court, notwithstanding the court's August 10, 1994 order approving the parties' stipulation to allow IELHC to intervene in the delinquency proceedings for the

purpose of proposing a rehabilitation plan." *Metcalf v. Investors Equity Life Ins. Co. of Haw., Ltd.*, 910 P.2d 110, 111 (Haw. 1996) [attached hereto as Pet'r's App. A]. In answering that question, the supreme court looked solely to the Rehabilitation and Liquidation Act and determined that "Article 15 [of the Act] does not recognize the interests of shareholders, like IELHC, of an insolvent insurance company." *Id.* (citing *Hartnett v. Southern Am. Fire Ins. Co.*, 495 So. 2d 902, 903 (Fla. Dist. Ct. App. 1986)). According to the Hawaii Supreme Court:

> Like the Florida statute construed in *Hartnett*, . . . the purpose of Article 15 is for "the protection of the interests of *insureds, claimants, creditors*, and the *public* generally with minimum interference with the normal prerogatives of the owners and managers of insurers." [HAW. REV. STAT.] § 431:15–101(d). "Absent from the purpose of the act is the protection of the *shareholders* of the insolvent insurance company. Section 431:15–101(c) provides that the act 'shall be liberally construed to effect the purpose stated in subsection (d).'" *Hartnett*, 495 So. 2d at 903 (emphasis in original). Therefore, we hold that IELHC did not have standing to oppose the petition to liquidate IEL in the instant case.

Id. (footnote omitted). With those observations, the Hawaii Supreme Court dismissed IELHC's appeal for lack of standing to oppose the Insurance Commissioner's liquidation petition. *Id.*

Although the Hawaii Supreme Court looked to the asserted statutory basis for IELHC's standing to challenge the liquidation petition—the Rehabilitation and Liquidation Act—it went no further. The court ignored IELHC's argument that it also had standing to oppose the Insurance Commissioner's petition to liquidate IEL, the holding company's wholly owned subsidiary, by virtue of IELHC's right under the United States Constitution not to be deprived of its property without due process of law. *See International Primate Protection League*, 500 U.S. at 77. Notwithstanding the Hawaii Supreme Court's construction of the applicable statute, the potential violation of IELHC's due process right provides the holding company with a "personal stake in the outcome of the controversy" such that IELHC had standing to oppose the liquidation petition.

C. IELHC's Due Process Right as a Basis for Standing to Oppose the Commissioner's Liquidation Petition

The Due Process Clause of the Fourteenth Amendment does not protect against all deprivations of a person's[6/] "life, liberty, or property" by a state government; it only protects against a governmental deprivation of a person's interest "without due process of law." U.S. CONST. amend. XIV, § 1; *see Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131, 1135 (10th Cir. 1994). In determining whether a state

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6/ A corporation is a "person" entitled to protection under the Fourteenth Amendment. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985); *Borreca v. Fasi*, 369 F. Supp. 906, 911 (D. Haw. 1974).

government has deprived an individual of its right to procedural due process,[7] the courts typically engage in a two-step inquiry: (1) whether the individual possesses a protected interest, such that the due process safeguards attach; and (2) if so, whether the individual was afforded the necessary due process protection under the circumstances. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("In short, once it is determined that the Due Process Clause applies, 'the question remains what process is due.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *Farthing*, 39 F.3d at 1135. As discussed below, the resolution of the first question requires reference to state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The determination of the second question generally involves the application of the balancing test adopted in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which focuses on the nature of the governmental and private interests at stake. *See id.* at 334 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (quoting *Morrissey*, 408 U.S. at 481).

7/ "The Due Process Clause not only provides a procedural safeguard against deprivations of life, liberty, and property but also protects substantive aspects of those interests from unconstitutional restrictions by government." *Harris v. Blake*, 798 F.2d 419, 424 (10th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *see Archuleta v. Colorado Dep't of Insts.*, 936 F.2d 483, 489 (10th Cir. 1991) ("Although the phrase 'due process' connotes a right to a fair hearing, the Supreme Court has recognized that the [Due Process Clause] contains a substantive component as well.") (citing *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494 (1977)). The issue presented for review to this Court relates to the procedural component of due process protection.

Only the first prong of the due process inquiry is relevant to the standing issue presented for review in this case. Specifically, if IELHC has a protected property interest in IEL, it is entitled to some degree of due process before the Insurance Commissioner or any other state governmental authority can deprive it of that interest, by liquidation or otherwise. The very existence of IELHC's constitutional right to due process provides the holding company with standing to oppose the Insurance Commissioner's liquidation petition. The second prong of the due process analysis—the amount of due process required under the circumstances—is only relevant to the merits of IELHC's underlying assertion of error concerning the circuit court's failure to conduct a full evidentiary hearing on the liquidation petition. As a result, the question here focuses on whether IELHC has a property interest protected by the Fourteenth Amendment.

The Constitution does not create or define the contours of "property" or, for that matter, "liberty," which are "the 'broad and majestic terms' enshrined in the Fourteenth Amendment." *Farthing*, 39 F.3d at 1135 (citing *Roth*, 408 U.S. at 571). Property interests, rather, "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* (quoting *Roth*, 408 U.S. at 571); *see Paul v. Davis*, 424 U.S. 693, 710 (1976) ("[Liberty and property] interests attain . . . constitutional status by virtue of the fact that they have been initially recognized and protected by state law."). Moreover, although "[this] Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *Roth*, 408 U.S. at 571–72, it is not necessary to move beyond those general property tenets in this case. It is uncontroverted that IELHC, at all relevant

times, owned one hundred percent of the authorized, issued, and outstanding shares of IEL's stock. Accordingly, because IEL was and remains a wholly owned subsidiary of IELHC, *see* HAW. REV. STAT. § 431:11–102 ("'Subsidiary of a specified person' means an affiliate controlled by the person directly or indirectly through one or more intermediaries."), IELHC has a protected property interest in IEL. *See* HAW. REV. STAT. § 431:15–332 (setting forth the priority of distribution for claims against an insurer's estate and specifically recognizing "[t]he claims of shareholders" as part of the final distribution "class"); HAW. REV. STAT. § 431:15–307 (Subject to certain exceptions, the rights and liabilities of an insurer and its "creditors, policyholders, *shareholders*, members and all other persons interested in its estate shall become fixed as of the date of entry of the order of liquidation.") (emphasis added).

IELHC's constitutional right to due process itself provides the holding company with standing to oppose the Insurance Commissioner's liquidation petition. Specifically, because IELHC has a property interest in IEL, it cannot be deprived of that interest without due process of law. U.S. CONST. amend. XIV, § 1; *see Baker*, 443 U.S. at 145. The state government's involuntary liquidation of IEL—IELHC's wholly owned subsidiary—constitutes a "deprivation of property" such that due process attaches. *See Board of Governors of the Fed. Reserve Sys. v. D.L.G. Fin. Corp.*, 29 F.3d 993, 1002–03 (5th Cir. 1994) (freezing of sole shareholder's assets "unquestionably affected an important property interest" and created a "[substantial] risk of an erroneous deprivation"), *cert. dismissed*, 115 S. Ct. 1085 (1995). Therefore, regardless of the *amount* of due process required under the circumstances, IELHC is at least entitled to *some* modicum of due process before it can be deprived of

its property interest in IEL. It is that right to due process which gives rise to IELHC's standing to oppose the liquidation petition, and to deny IELHC that opportunity "for lack of standing," as the state court did in this case, is tantamount to depriving IELHC of its property interest without due process of law. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.) (While Congress, and by analogy the Hawaii state legislature, "has the undoubted power to give, withhold, and restrict the jurisdiction of courts . . . , it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . . ."), *cert. denied*, 335 U.S. 887 (1948).

In summary, while the Hawaii Supreme Court has recognized that it cannot sanction every challenge to governmental action, the court's "basic position has been that standing requirements should not be barriers to justice." *Life of the Land*, 623 P.2d at 439; *see Ariyoshi v. Hawaii Pub. Employment Relations Bd.*, 704 P.2d 917, 923 (Haw. Ct. App. 1985). The Hawaii courts thus have subscribed to the following "common sense position on standing requirements":

> Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice. One whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts [its] interest is illegal.

Life of the Land, 623 P.2d at 439 n.8 (quoting Kenneth C. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 473 (1970)). The standing touchstone therefore remains

"the needs of justice." *Ariyoshi*, 704 P.2d at 923 (citing *Life of the Land*, 623 P.2d at 441).

The foregoing principle applies with equal if not greater force in this context. IELHC had standing to oppose the Insurance Commissioner's petition to liquidate IEL, its wholly owned subsidiary, by virtue of IELHC's constitutional right not to be deprived of its property without due process of law. The Hawaii Supreme Court dismissed IELHC's appeal for lack of standing to oppose the liquidation petition, however, without so much as mentioning IELHC's assertion of standing on constitutional grounds. The "needs of justice" in this case require the Hawaii Supreme Court to step from behind the standing barrier and reach the merits of IELHC's assertions of error.

CONCLUSION

For the reasons stated herein, Petitioner IELHC respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MILES C. CORTEZ
Counsel of Record
SHELDON E. FRIEDMAN
CHRISTOPHER T. MACAULAY
JAMES SHORTALL, JR.
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Attorneys for Petitioner

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF HAWAII

WAYNE C. METCALF, Insurance Commissioner of the State of Hawaii, Petitioner-Appellee,[1] v. INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., a Hawaii Corporation, Respondent; and INVESTORS EQUITY LIFE INSURANCE HOLDING COMPANY, Intervenor-Appellant

No. 18691

APPEAL FROM THE FIRST CIRCUIT COURT

(S.P. NO. 94-0337)

January 11, 1996

MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, J.J.

APPEAL FROM THE FIRST CIRCUIT COURT

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[1] Wayne C. Metcalf succeeded Lawrence M. Reifurth as the Insurance Commissioner of the State of Hawaii during the pendency of this action. Pursuant to Hawaii Rules of Appellate Procedure (HRAP) Rule 43(c)(1), Metcalf has been substituted automatically for the Petitioner-Appellee in the instant case. Although not a named party, the Hawaii Life and Disability Insurance Guaranty Association is expressly granted standing to appear in the delinquency proceedings in this case under H.R.S. § 431:16-208(1) (1993).

Per curiam. Intervenor-Appellant Investors Equity Life Insurance Holding Company (IELHC) appeals from the circuit court's January 27, 1995 order granting Petitioner-Appellee's petition to liquidate Investors Equity Life Insurance Company of Hawaii (IEL) pursuant to Hawaii Revised Statutes (HRS) chapter 431, article 15 (1993), the Insurers Supervision, Rehabilitation and Liquidation Act (Article 15).[2]

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[2] H.R.S. § 431:15-306 (1993) provides:

Grounds for liquidation. The commissioner may petition the circuit court of the first judicial circuit for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this State on any ground under which the commissioner may apply for an order of rehabilitation under section 431:15-301, whenever the commissioner believes that attempts to rehabilitate the insurer would substantially increase the risk of loss to its creditors, its policyholders or the public, or would be futile, or that rehabilitation would serve no useful purpose, whether or not there has been a prior order directing the rehabilitation of the insurer.

The provisions of H.R.S. § 431:15-301(a) relevant to the instant case are:

Grounds for rehabilitation. (a) The commissioner may apply by petition to the circuit court of the first judicial circuit for an order authorizing the commissioner to rehabilitate a domestic insurer or an alien insurer domiciled in this State, on any one or more of the following grounds whenever the commissioner reasonably believes that the insurer may be successfully rehabilitated without substantial increase in the risk of the loss to the insurer's policyholders, creditors, or the public:

(1) The insurer is insolvent;

(2) The insurer is in such condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors or the public;

. . . [and]

(12) The insurer has failed to file its annual report or other financial report required by statute within the time allowed by law and, after written demand by the commissioner, has failed to give an adequate explanation immediately[.]

IEHLC, which is IEL's parent company,[3] raises two points of error on appeal: (1) there is insufficient evidence in the record to support the circuit court's findings of fact (FOF) and conclusions of law (COL); and (2) the circuit court's failure to provide for a full evidentiary hearing was a denial of IELHC's right to due process. We do not reach these contentions, however, because IELHC lacked standing to oppose the liquidation petition in the circuit court.

The dispositive issue in this case is whether IELHC had standing to appear before the circuit court, notwithstanding the court's August 10, 1994 order approving the parties' stipulation to allow IELHC to intervene in the delinquency proceedings for the purpose of proposing a rehabilitation plan.

Although HRS § 431:15-307(d) (1993) provides that the circuit court may make the necessary declarations in a proceeding to liquidate an insurance company "[a]fter providing such notice and hearing *as it deems proper*" (emphasis added), the court's decision to provide IELHC an opportunity to participate in these delinquency proceedings did not, in itself, confer standing on the company. Article 15 does not recognize the interests of shareholders, like IELHC, of an insolvent insurance company. *Cf. Hartnett v. Southern Am. Fire Ins. Co.*, 495 So. 2d 902, 903 (Fla. Dist. Ct. App. 1986) (affirming the trial court's holding that shareholders of an insolvent insurance corporation did not have standing to

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[3] IEL, which was purchased by IEHLC in 1991, is an insurance company primarily involved in the issuance of deferred annuities as well as traditional and interest-sensitive life insurance policies.

participate in delinquency proceedings). Rather, HRS § 431:15-104(c) (1993) provides:

> *No court of this State has jurisdiction to entertain, hear or determine any complaint* praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of any insurer, or *praying for an injunction or restraining order or other relief* preliminary to, *incidental to, or relating to that type of proceedings other than in accordance with this article.*

(Emphases added.) Under Article 15, the Insurance Commissioner possesses the sole discretion to prepare a rehabilitation plan "*[i]f* the rehabilitator [i.e., the Insurance Commissioner] determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is *appropriate*[.]" HRS § 431:15-303(d) (emphases added).[4] Furthermore, HRS § 431:15-305(a) (1993) provides in pertinent part that "[t]he court shall permit *the directors of the insurer* to take such actions as are reasonably necessary to defend against the petition[.]" (Emphasis added.)

Like the Florida statute construed in *Hartnett*, *supra*, the purpose of Article 15 is for "the protection of the interests of *insureds, claimants, creditors*, and the *public*

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[4] We expressly decline to decide the question whether it is an abuse of discretion for the circuit court to rely upon arguments presented "[a]fter providing such notice and hearing as it deems proper" under HRS § 431:15-307(d), when issuing an order resolving a petition for liquidation.

generally with minimum interference with the normal prerogatives of the owners and managers of insurers[.]" HRS § 431:15-101(d) (emphases added). "Absent from the purpose of the act is the protection of *shareholders* of the insolvent insurance company. Section [431:15-101(c)] provides that the act 'shall be liberally construed to effect the purpose stated in subsection ([d]).' " *Hartnett*, 495 So. 2d at 903 (emphasis in original).[5] Therefore, we hold that IELHC did not have standing to oppose the petition to liquidate IEL in the instant case.

Accordingly, this appeal is dismissed for lack of IELHC's standing to oppose the petition to liquidate IEL in the circuit court.

/s/ Justices

On the briefs:

Wayne S. Sakamoto (of counsel) (John Francis Perkin, Lyle Hosoda, Kimble R. Cook, and Donald L. Wilkerson, with him on the briefs of Perkin & Hosoda), for intervenor/respondent-appellant

John Y. Yamano (William C. McCorriston, and Joel D. Kam, with him on the brief of McCorriston Miho Miller Mukai), for petitioner-appellee

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[5] We observe that IELHC "do[es] not assert that the board of directors of [IEL] failed to protect their interests or any special aspect thereof." *Minor v. Stephens*, 898 S.W.2d 71, 76 (Ky. 1995) (holding, inter alia, that shareholders were not entitled to appointment of an official committee to protect their interests).

David J. Reber (Karen L.S. Stanitz, and Russell K. Kaupu, with him on the brief of Goodsill Anderson Quinn & Stifel), for intervenor-appellee

APPENDIX B

No. 18691
IN THE SUPREME COURT OF
THE STATE OF HAWAII

S.P. No. 94-0337

(Special Proceeding)

APPEAL FROM THE FINAL JUDGMENT FILED ON
JANUARY 27, 1995

FIRST CIRCUIT COURT

HONORABLE HERBERT K. SHIMABUKIRO
HONORABLE PATRICK K.S.L. YIM
JUDGES

LAWRENCE M. REIFURTH,
Insurance Commissioner of the State of Hawaii,

Petitioner-Appellee,

vs.

INVESTORS EQUITY LIFE HOLDING COMPANY,

Intervenor/Respondent-Appellant,

and

INVESTORS EQUITY LIFE INSURANCE COMPANY OF
HAWAII, LTD., a Hawaii corporation,

Respondent.

NOTICE AND JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the opinion of the Supreme Court entered on January 11, 1996 the appeal from the order of the Circuit Court of the First Circuit entered on January 27, 1995 is dismissed.

DATED: Honolulu, Hawaii, January 24, 1996.

BY THE COURT:

/s/ Eugene L. Sabado
Clerk

APPROVED:

/s/ Robert G. Klein (Seal)
Justice of the Supreme Court

APPENDIX C

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

S. P. NO. 94-0337
(Special Proceeding)

LAWRENCE M. REIFURTH, Insurance Commissioner of the State of Hawaii,

Petitioner,

v.

INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., a Hawaii corporation,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. INTRODUCTION

On August 5, 1994, Petitioner LAWRENCE M. REIFURTH, Insurance Commissioner of the State of Hawaii ("Petitioner"), filed a Petition for Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd. ("Petition for Liquidation").

On August 11, 1994, Intervenor INVESTORS EQUITY LIFE HOLDING COMPANY ("Intervenor

IELHC") filed an Answer to Petition for Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd. ("Answer").

On August 11, 1994, Intervenor IELHC filed a Petition for Approval of Intervenor's Plan of Rehabilitation of Investors Equity Life Insurance Company of Hawaii, Ltd. ("IELHC's Petition for Rehabilitation").

On August 11, 1994, KENNETH K. S. FONG, ELLA F. LAM, THOMAS H. TAKAMUNE, and KURTIS B. BRAY (collectively "Former Directors and Officers") filed a Memorandum in Opposition to Petitioner Lawrence M. Reifurth's Petition for Liquidation Filed 08/05/94.

On August 12, 1994, Respondent INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD. ("IEL") filed an Objection to Petition for Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd. Filed on 08/05/94.

On September 1, 1994, Petitioner filed a Memorandum in Response to Intervenor IELHC's Petition for Approval of Intervenor's Plan of Rehabilitation Dated August 11, 1994.

On September 13, 1994, the Hawaii Life and Disability Insurance Guaranty Association ("HLDIGA") filed a Statement of Position Re: Petition for Liquidation Filed August 15, 1994.

On September 13, 1994, Petitioner filed a Supplemental Memorandum Re: Intervenor IELHC's Petition for Approval of Intervenor's Plan of Rehabilitation Dated August 11, 1994.

On September 13, 1994, the Former Directors and Officers filed a Memorandum Re: Evidentiary Hearing Issues.

On September 13, 1994, Intervenor IELHC filed a Supplemental Memorandum Re: Constitutional and Statutory Requirements for Hearing on Rehabilitation or Liquidation of Respondent Investors Equity Life Insurance Company of Hawaii, Ltd.

On September 13, 1994, ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA ("Alexander Hamilton") filed a Motion to Intervene and a Supplemental Briefing Requested by the Court on: (1) the Petition for Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd. Filed August 5, 1994; and (2) the Petition for Approval of Intervenor's Plan of Rehabilitation of Investors Equity Life Insurance Company of Hawaii, Ltd. filed August 11, 1994.

Hearings on Petitioner's Petition for Liquidation and Intervenor IELHC's Petition for Rehabilitation were conducted on August 15, August 16, September 2, September 6, and September 19, 1994. Alexander Hamilton's Motion to Intervene was heard on September 19, 1994. Jerrold Y. Chun, Esq. and John Y. Yamano, Esq. appeared on behalf of Petitioner. John Francis Perkin, Esq., Lyle S. Hosoda, Esq., Kimble R. Cook, Esq., Mark G.S. Au, Esq. appeared on behalf of Intervenor IELHC. Joseph K. Hegedus, Esq. made a special appearance by agreement of the parties at the September 2, September 6, and September 19, 1994 hearings on behalf of Intervenor IELHC. Glenn K. Sato, Esq., Ward F. N. Fujimoto, Esq., Paul H. Sato, Esq., and Kerry M. Komatsubara, Esq. appeared on behalf of the Former Directors and Officers. David J. Reber, Esq.

appeared on behalf of HLDIGA. Jeffrey S. Portnoy, Esq. and Blane T. Yokota, Esq. appeared on behalf of Alexander Hamilton with respect to the Motion to Intervene. Gerald C. Yoshida, Esq. appeared on behalf of IEL.

Having reviewed and considered the evidence and arguments presented at the hearings, together with the entire record of this proceeding, this Court hereby renders the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Petitioner LAWRENCE M. REIFURTH ("Petitioner") is, at all times relevant herein, the duly appointed Insurance Commissioner of the State of Hawaii, pursuant to H.R.S. § 431:2-102.

2. Respondent INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD. ("IEL") is an insurer, as that term is defined in H.R.S. § 431:1-202 and used in the insurance laws of the State of Hawaii, and is a domestic insurance corporation organized and existing under the laws of this State.

3. Intervenor INVESTORS EQUITY LIFE HOLDING COMPANY ("Intervenor IELHC") owns all of the authorized, issued, and outstanding stock of IEL.

4. The HAWAII LIFE AND DISABILITY INSURANCE GUARANTY ASSOCIATION ("HLDIGA") was created by the Hawaii legislature through the enactment of the Hawaii Life and Disability Insurance Guaranty Association Act, H.R.S. § 431:16-201 *et seq.* ("Association Act"). The Association Act established HLDIGA for the purpose of protecting policyholders under life and disability insurance policies and annuity contracts in the event of the impairment or insolvency of life insurance companies

licensed in Hawaii. Under the Association Act, upon the entry of an order of liquidation containing a finding of insolvency, the HLDIGA becomes obligated, subject to certain limitations, to provide continuing coverage for policyholders of the insolvent insurer.

5. KENNETH K. S. FONG, ELLA F. LAM, THOMAS H. TAKAMUNE, and KURTIS B. BRAY (collectively "Former Directors and Officers") are former Directors and Officers of IEL.

6. ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA ("Alexander Hamilton") is a Michigan corporation with its principal place of business in Farmington Hills, Michigan. Alexander Hamilton is an insurer in the State of Hawaii, writing approximately twenty percent (20%) of the annuities in the State.

7. On June 22, 1994, the First Circuit Court granted a Seizure Order to authorize the Insurance Commissioner of the State of Hawaii to take possession and control of all of the assets of IEL.

8. On June 24, 1994, a Stipulated Rehabilitation Order was entered in the Circuit Court of the First Circuit, State of Hawaii, in S.P. No. 94-0337, whereby Petitioner and IEL stipulated that adequate grounds existed for the entry of a Rehabilitation Order pursuant to H.R.S. § 431:15-301. The Insurance Commissioner was appointed Rehabilitator of IEL pursuant to the Stipulated Rehabilitation Order.

9. On or about July 26, 1994, the accounting firm of Coopers and Lybrand issued a "compilation report" on the statutory balance sheet of IEL which reported a net deficit position for IEL of approximately $65 Million. A "compilation" is limited to presenting in the form of financial

statements, information that is the representation of management. Subsequently, the Commissioner retained Coopers & Lybrand to perform a special purpose review of IEL.

10. The work papers of Coopers & Lybrand, after further reviewing IEL's assets and liabilities, indicated a net deficit in excess of $90 Million.

11. The Court finds that IEL is insolvent as that term is defined in H.R.S. § 431:15-103(a)(10)(B), and is in such condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors, and the public. Although the full extent of IEL's insolvency has been questioned and may not be known with certainty for some time, the fact that IEL is insolvent, with a deficiency probably in excess of $90 million, is not disputed.

12. The Court finds further that Respondent IEL failed to file its annual report or other financial report required by statute within the time allowed by law, and, after written demand by the Commissioner, failed to give an adequate explanation for such failure immediately.

13. The Court finds further that the interests of policyholders, creditors or the public may be endangered by delay and that attempts to rehabilitate the insurer would be futile and/or would serve no useful purpose.

14. With respect to the proposed plan of rehabilitation prepared by Investors Equity Life Holding Company and Gary Vose ("IELHC Rehabilitation Plan"), IELHC contends that the contribution of certain assets by IELHC to IEL would "eliminate completely" the insolvency of IEL.

15. The IELHC Rehabilitation Plan was reviewed by Petitioner and his representatives, including Peterson Consulting Limited Partnership ("Peterson Consulting") who are consultants retained by the Petitioner to assess the potential value and feasibility of the IELHC Rehabilitation Plan's projections. Peterson Consulting reviewed the IELHC Rehabilitation Plan, as submitted to this court on August 10, 1994, and as amended on August 24, 1994. Peterson Consulting also reviewed available documents at the IELHC Newport Beach, California headquarters and the compiled balance sheet as of June 24, 1994, prepared by Coopers & Lybrand.

16. The documents reviewed included certain files related to the assets proposed to be contributed by IELHC to IEL. These files contained documentation such as appraisals, property closing and correspondence files. Peterson Consulting also reviewed two binders which were represented by IELHC personnel to be supporting documentation for the plan's projections. These binders did not appear to provide significant information regarding the contributed assets.

17. Based on the currently available documentation and information as listed above, Peterson Consulting performed two analyses:

(A) The potential maximum present market value of real estate projects to be contributed.

(B) A review of possible future potential value of the contributed real estate projects.

18. Based upon its review of information and documents made available by IELHC, Peterson Consulting

determined a maximum present market value of the real estate projects proposed to be contributed by IELHC to IEL to be in the range of approximately $15 Million to $26 Million. The above value was based on documentation that is not necessarily independent or reliable, including an offer to sell the "Meadows" property, a terminated Purchase Agreement on "Eagles Nest" and the purported value of contributed assets per unexecuted Joint Venture Operating Agreements (commercial and apartment project). In general, the files lacked documentation that was current or specific to the appropriate phases of the projects. The above maximum present market value range may be higher than actual market value.

19. The above valuation does *not* include for each property certain significant considerations such as IELHC's actual ownership interest, encumbrances, contingent liabilities, investment requirements, ability to raise capital, marketability, liabilities (such as environmental exposures) associated with the ownership of real property and the time required to realize market value. The evaluation of any or all of these items could negatively influence Peterson Consulting's valuation of the "contributed" assets.

20. The August 24, 1994, version of the IELHC Rehabilitation Plan states that the contributed assets have a present value of $55,657,000 and will generate potential cash flow of $87,763,000. Assuming that the components that generate the $87 Million can be relied upon as accurate, the $55 Million present value estimated by IELHC was based on a discount rate that does not adequately reflect the risks associated with these types of projects.

21. IELHC discounted $87,763,000 by 7% to arrive at a present value of $55,657,000 as of June 24, 1994.

A 7% discount rate is more representative of a relatively short-term, risk free rate, such as a U.S. Treasury Security yield for a two-year instrument. A 7% discount rate is inappropriate for undeveloped real estate projects such as the contributed assets. The risk factor for undeveloped real estate is much greater than U.S. Treasury Securities. Accordingly, the discount rate/rate of return must be much higher. Some of the more obvious factors to consider when determining an appropriate discount rate include:

(A) Marketability/liquidity

(B) Ability to raise necessary capital or financing in order to increase marketability

(C) Terms and conditions related to any capital infusion or financing

(D) Project reputation

(E) Availability of resources (e.g. developer)

22. It is almost universally accepted that real estate development projects, because of their inherent speculative nature, command a much higher rate of return than 7%. Based on IELHC correspondence, the nature of the properties and the time and risks entailed in realizing their values, a 30% discount rate is more appropriate than a 7% rate for these types of real estate developments.

23. Using a 30% discount rate rather than a 7% discount rate, the present value of the projected stream of cash flow from the assets proposed to be contributed by IELHC would be approximately $20 Million.

24. Whether IEL's deficit is $65 Million or in excess of $90 Million, it is not reasonable or feasible to conclude that the IELHC Rehabilitation Plan will or can satisfy the deficit.

25. The record before this Court does not establish IELHC's claims that the IELHC Rehabilitation Plan will "eliminate completely the alleged insolvency of Investors Equity, cause all existing policyholders to be fully paid, make sufficient funds available to satisfy all claims of creditors, . . . and restore Investors Equity to a viable going concern."

26. Petitioner has presented a substantial factual basis in support of its position through affidavits and exhibits. Conversely, IELHC and the Former Directors and Officers have failed to provide any factual support for their respective arguments by way of affidavits and exhibits.

27. There are no genuine issues of material fact raised by the submissions made by the parties with respect to the relevant issues presented by the Petition for Liquidation and the IELHC Petition for Rehabilitation.

28. Petitioner has acted reasonably and has not abused his discretion in determining to proceed with liquidation and to seek a declaration of insolvency.

29. If any of the foregoing Findings of Fact are properly deemed Conclusions of Law, the Court so concludes.

III. CONCLUSIONS OF LAW

1. Article 15, H.R.S. § 431:15-101, et seq. ("Article 15"), provides the statutory framework for the supervision, rehabilitation and liquidation of insurers who do business in Hawaii. The stated purpose of Article 15 is "the

protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers." H.R.S. § 431:15-101(d).

2. Pursuant to H.R.S. § 431:15-104:

> (c) No court of this State has jurisdiction to entertain, hear or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of any insurer, or praying for an injunction or restraining order or other relief preliminary to, incidental to, or relating to that type of proceedings other than in accordance with [Article 15].

Article 15 does not recognize the right of a shareholder of an insurance company or any person other than the Insurance Commissioner to seek approval of a plan of rehabilitation of an insurance company.

3. The Legislature has granted the Insurance Commissioner expansive powers to effectuate an orderly and comprehensive rehabilitation or liquidation of domestic insurers. H.R.S. § 431:15-303(b) provides:

> (b) The rehabilitator may take such action as the rehabilitator deems necessary or appropriate to reform and revitalize the insurer. The rehabilitator shall have all the powers of the directors, officers, and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. The rehabilitator shall have full powers to direct and manage, to hire and discharge employees subject to any contract

> rights they may have, and to deal with the property and business of the insurer.

4. It is generally recognized that the Insurance Commissioner is afforded broad supervisory powers to regulate the insurance business, including the power to exercise control over insolvent insurers. *Foster v. Mutual Fire Ins.*, 614 A.2d 1086, 1091 (Pa. 1992) ("[I]t is not the function of the courts to reassess the determinations of fact and public policy made by the Rehabilitator in exercising such powers over an insolvent insurer. Rather, the involvement of the judicial process is limited to the safeguarding of the [rehabilitation] plan from any potential abuse of the Rehabilitator's discretion.") In *Foster*, the appellate court adopted the following three-part standard in order to make a reasonable evaluation of the lower court's review of the Insurance Commissioner's activity:

> (1) examination of whether the Commonwealth court exceeded its statutory authority to approve, disapprove or modify the rehabilitation plan; (2) determine whether the Commonwealth Court substituted any of its own beliefs into the rehabilitation process; and (3) if so, whether the exercise of such discretion was for the prevention of further abuse by the Rehabilitator, and not to change the substance of the plan.

614 A.2d at 1092. The court further noted that this limited scope of review was especially appropriate in a highly specialized industry such as insurance, where the skill, judgment and expertise of the Insurance Commissioner are statutorily recognized and deferred to, resulting in a broad scope of discretionary powers.

5. The expansive powers relating to the rehabilitation or liquidation of an insurer were granted to the Insurance Commissioner by the State legislature in order to protect the strong interest the state has in protecting its citizens in their dealings with insurance companies. H.R.S. § 431:15-101(d); *see also State ex rel. Long v. Beacon Ins. Co.*, 359 S.E.2d 508, 511 (N.C. App. 1987) ("The primary purpose of such regulatory laws is protection of the insuring public, requiring that statutes be liberally construed to achieve that purpose [citation omitted]. Statutory regulation of the insurance industry is of vital importance to the consumer, who must rely upon the industry for protection, and yet who clearly does not have equal knowledge or resources at his disposal in his dealings with the business of insurance.")

6. With regard to the power to submit a plan of rehabilitation of an insurer, Article 15 specifically limits that power to the Insurance Commissioner. H.R.S. § 431:15-303 provides, in part:

> (d) If the rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate, the rehabilitator shall prepare a plan to effect such changes. Upon application of the rehabilitator for approval of the plan and after such notice and hearings as the court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified.

7. The expansive powers of an insurance commissioner to promulgate a plan of rehabilitation, and the

court's authority in approving that plan, were discussed at length by the Washington Supreme Court in *Kueckelhan v. Federal Old Line Ins. Co.*, 444 P.2d 667 (Wash. 1968). In overturning the trial court and approving a proposed rehabilitation plan, that court stated:

> The primary duty impressed by the statute upon the Commissioner in a rehabilitation proceeding is to correct or remove the causes and conditions which have made the rehabilitation proceeding necessary and, if possible, to conserve and restore the company to a viable status for the benefit of the policyholders. Toward this end he must be afforded that freedom of action in the overall management of the company which will permit him to knowledgeably evaluate, plan, devise, and implement a program which in his best judgment and in keeping with his expertise in the field of insurance will accomplish the objective of the proceeding. . . . As the program of rehabilitation takes form and the steps unfold, the trial court in its supervisory and reviewing role may not substitute its judgment for that of the Commissioner, but may and should only intervene or restrain when it is made to appear that the Commissioner is manifestly abusing the authority and discretion vested in him and/or is embarking upon a capricious, untenable or unlawful course.

Kueckelhan, 444 P.2d at 674.

8. To give effect to the expansive rehabilitation principles set forth, courts have shown great deference to an insurance commissioner's discretion to submit a plan of rehabilitation. The standard generally applied is that the plan submitted by the insurance commissioner should be adopted and approved by the court unless it is determined to be arbitrary, capricious or unlawful. *See Kueckelhan*, 444 P.2d at 674; *American Benefit Life Insurance Co. [v.] Hill Country Life Ins. Co.*, 582 S.W.2d 227, 229 (Tex. Civ. App. 1979) (plan of rehabilitation not to be set aside absent proof of abuse of discretion or gross inequity).

9. On the other hand, whenever the insurance commissioner believes that rehabilitation would be futile or would substantially increase the risk of loss to creditors, policyholders or the public, he may petition the court for an order of liquidation. H.R.S. § 431:15-305 and 306. It is logical that the insurance commissioner should be given similar deference with respect to a petition for liquidation as is recognized with respect to a petition for rehabilitation. The decision herein of the Rehabilitator to obtain an order of liquidation is not arbitrary, capricious or unlawful.

10. Pursuant to H.R.S. § 431:15-305, the "court shall permit the directors of the insurer to take such actions as are reasonably necessary to defend against the [liquidation] petition . . ." Thus, while the directors of IEL are permitted to object to a petition for liquidation, there is no authority for shareholders, policyholders, or creditors to intervene in the proceeding to challenge the discretionary authority of the Insurance Commissioner to implement a plan of liquidation. *See Hartnett v. Southern American Fire Insurance Co.*, 495 So. 2d 902 (Fla. Dist. Ct. App. 1986) (Pursuant to Chapter 631 of the Florida statutes, shareholders

of an insolvent insurer are not "interested persons" entitled to appear at a receivership hearing).

11. This Court concludes that, consistent with the foregoing, Alexander Hamilton has no standing to intervene in the present proceedings.

12. This Court concludes that, consistent with the foregoing, IELHC has no standing to submit a plan of rehabilitation to this Court. Notwithstanding this conclusion, IELHC has been afforded a full opportunity to present its position in this proceeding and its submissions have been considered, without regard to its lack of standing.

13. HLDIGA has standing to appear before this Court in connection with these proceedings pursuant to H.R.S. § 431:16-208(1).

14. Pursuant to H.R.S. § 431:15-306:

> The commissioner may petition the circuit court of the first judicial circuit for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this State on any ground on which the commissioner may apply for an order of rehabilitation under section 431:15-301, *whenever the commissioner believes that attempts to rehabilitate the insurer* would substantially increase the risk of loss to its creditors, its policyholders or the public, or *would be futile*, or that rehabilitation would serve no useful purpose, whether or not there has been a prior order directing the rehabilitation of the insurer.

(Emphasis added).

15. H.R.S. § 431:15-301 provides the following grounds, among others, that may be the basis of a petition for liquidation:

> (1) The insurer is insolvent;
>
> (2) The insurer is in such condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors or the public;
>
> * * * * *
>
> (12) The insurer has failed to file its annual report or other financial report required by statute within the time allowed by law and, after written demand by the commissioner, has failed to give an adequate explanation immediately . . .

16. Although Article 15 does not specifically require that a hearing be held regarding a petition for liquidation, this Court has allowed all appropriate parties to raise objections to the present Petition for Liquidation and to make a full presentation of their respective positions.

17. To the extent that objections have been raised to the Petitioner's Petition for Liquidation, the objecting party bears the burden of proving that there is insufficient basis for the Petitioner's requested relief. The burden of proof with respect to an Insurance Commissioner's decision to proceed with a conservatorship action was specifically examined in *Atlantic and Pacific Insurance Company v. Barnes*, 666 P.2d 163 (Col. 1983). In *Barnes*, the court acknowledged the broad discretion given to the Insurance

Commissioner with respect to an insurer insolvency proceeding. As noted in *Barnes*:

> When a party brings an action challenging an administrative decision of a state official, acting as such, then the burden of proof is on the party challenging the official action. (Citation omitted.) In this case, it was [the insurer] who was seeking to change status quo. If no evidence had been presented at the hearing, then the Insurance Commissioner would have prevailed and the order of conservatorship would have remained in effect. . . . Thus, [the insurer] had the burden of establishing by a preponderance of the evidence the impropriety of the conservatorship. Hence, it was error to place the burden of proof on the Insurance Commissioner.

666 P.2d at 165.

18. A similar standard is appropriate in this proceeding. The Insurance Commissioner has made a reasonable examination of the financial status of IEL together with an examination of the IELHC Plan of Rehabilitation, and has determined that it is his belief that liquidation is appropriate. Any challenge to the Petition for Liquidation must establish, by a preponderance of the evidence, that the grounds upon which the Petition is based are incorrect and/or that the Petitioner has abused his discretion.

19. The parties opposing the Petition for Liquidation have failed to make any showing that the grounds upon which the Petition for Liquidation is based are

incorrect or that the Petitioner has abused his discretion. Moreover, even if the burden of proof were on the Petitioner, the Petitioner has proved the existence of the grounds upon which its Petition for Liquidation is based and has proved that it has not abused its discretion.

20. This Court believes that it is appropriate to give significant deference to the determinations of the Petitioner. Consistent therewith, it would be inappropriate for the court to substitute its discretion in place of the Petitioner's administrative discretion and force the implementation of a rehabilitation plan that is not supported by the Petitioner.

21. The Petition for Liquidation also seeks a declaration of insolvency. Pursuant to H.R.S. § 431:15-307(d), "[a]t the time of petitioning for an order of liquidation, or at any time thereafter, the commissioner, after making appropriate findings of an insurer's insolvency, may petition the court for a judicial declaration of such insolvency. After providing such a notice and hearing as it deems proper the court may make the declaration."

22. H.R.S. § 431:15-307(d) clearly grants discretion to the court in setting the terms and conditions of the "notice and hearing" required prior to the entry of a declaration of insolvency, although the statute appears to be intended to guarantee certain fundamental due process rights to affected parties.

23. A due process right exists if the interest which a claimant seeks to protect is property within the meaning of the due process clause of the federal or state constitution. *Kernan v. Tanaka*, 75 Haw. 1, 856 P.2d 1207 (1933), *cert. den.* 127 L. Ed. 2d 389 (1994). Due process encompasses the opportunity to be heard at a meaningful time and in a

meaningful manner. *Id.*; *Evans v. Takao*, 74 Haw. 267, 842 P.2d 255 (1992). Due process is not a fixed concept, but "is flexible and calls for such procedural protections as the particular situation demands." *Kernan v. Tanaka*, 856 P.2d at 1218 (citations omitted); *Sandy Beach Defense Fund v. City Council of the City and County of Honolulu*, 70 Haw. 361, 773 P.2d 250, 261 (1989) (citations omitted).

24. In light of the statutory requirement of a "notice and hearing" in connection with a petition for judicial declaration of insolvency and the constitutional guarantees of due process under Hawaii law, this Court has allowed parties whose property interests are affected by the requested declaration of insolvency to appear and be heard. *See Stewart v. Citizens Casualty Company of New York*, 23 N.Y.2d 407, 297 N.Y.S.2d 115 (N.Y. 1968), *cert. den.* 401 U.S. 910 (1971) (provision of the New York Insurance Code requiring a "full hearing" in connection with an application to rehabilitate an insurance company invoked constitutional requirements of due process and authorized the company to present evidence regarding the issue of insolvency). No evidence has been presented by any person that even suggests that IEL is not insolvent.

25. IELHC and the Former Directors and Officers have argued that it is necessary for this Honorable Court to conduct a full evidentiary hearing on the Petition for Liquidation before an order of liquidation can be issued. In support of their position, such parties have relied on a Florida District Court of Appeal decision, *In Re Southland Insurance Company*, 535 So. 2d 648 (Fla. 1988).

26. *In Re Southland* is distinguishable from the present proceeding. First, the Florida statute which defines the "Grounds for Liquidation" differs in a significant way

from H.R.S. § 431:15-306. The Hawaii statute specifically provides that:

> The commissioner may petition the circuit court of the first judicial circuit for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this State on any ground on which the commissioner may apply for an order of rehabilitation under section 431:15-301, **whenever the commissioner believes that attempts to rehabilitate the insurer would substantially increase the risk of loss to its creditors, its policyholders or the public, or would be futile, or that rehabilitation would serve no useful purpose,** whether or not there has been a prior order directing the rehabilitation of the insurer. (Emphasis added.)

On the other hand, Section 631.061, Florida Statutes, omits the highlighted language cited above. Thus, contrary to the Hawaii statutory scheme, the Florida Insurance Department's belief regarding the efficacy of rehabilitation is irrelevant under the Florida statutory provisions governing insurer insolvencies.

Furthermore, the factual basis for the appellate court's order to remand the case for an "evidentiary hearing" is distinguishable from the facts herein. In *In re Southland*, the Department of Insurance attempted to enter into a "stipulation of insolvency with the insurer for the purpose of rehabilitation, and then use that stipulation to convert the rehabilitation proceeding into a liquidation proceeding without presenting any evidence of its compliance with the

chapter during the rehabilitation process." 535 So.2d at 649. Thus, the record before the appellate court was "totally devoid" of evidence that the Department attempted to rehabilitate **or of evidence supporting its conclusion that further efforts to rehabilitate would be useless.** There is nothing in *In re Southland* to suggest that a record supported by credible affidavits would have been insufficient to satisfy the Department's requisite showing of compliance with the insolvency statute.

27. Unlike the situation in *In Re Southland*, the record before this Court contains ample evidence in the form of affidavits to support the finding that IEL is insolvent and that further efforts to rehabilitate IEL would serve no useful purpose. Despite ample opportunity to submit countervailing affidavits on the issue of insolvency, none have been submitted. To the contrary, Intervenor IELHC's own affidavits and arguments concede IEL's substantial insolvency. Thus, this Court concludes that a full evidentiary hearing is neither necessary nor appropriate with respect to the present Petition for Liquidation, the IELHC Petition for Rehabilitation, or the request for a declaration of insolvency.

28. The parties herein have been afforded a full and fair opportunity to present any and all arguments and factual bases supporting or opposing the Petition for Liquidation and IELHC Petition for Rehabilitation, including the Petitioner's request for a declaration of insolvency.

29. To the extent that the parties to the Petition for Liquidation and/or IELHC Petition for Rehabilitation are deemed to have been entitled to a full evidentiary hearing on some or all of the matters herein, this Court concludes that the absence of such a hearing is not prejudicial to the

substantial rights of the parties, and in no way affected the final outcome of the matters pending before this Court.

30. This Court further concludes that: (1) Petitioner presented a substantial factual basis in support of its position through affidavits and exhibits; (2) IELHC and the Former Directors and Officers failed to provide any factual support for their respective arguments by way of affidavits and exhibits; and (3) there are no genuine issues of material fact with respect to the relevant considerations presented by the Petition for Liquidation, the IELHC Petition for Rehabilitation, and Petitioner's request for a declaration of insolvency.

31. This Court further concludes that the opposition to the Petition for Liquidation in the form of IELHC's Rehabilitation Plan is dependent upon the success of speculative real estate investments. Such speculative contentions fall far short of creating a genuine issue of fact with respect to the factual basis for the Petition for Liquidation.

32. The conditions presented by Petitioner, and supported by the record herein, are sufficient cause for entry of an order declaring IEL insolvent and authorizing the Commissioner to liquidate Respondent IEL pursuant to Haw. Rev. Stat. § 431:15-306, *et seq.*

33. If any of the foregoing Conclusions of Law are properly deemed Findings of Fact, the Court so concludes.

IV. ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Alexander Hamilton's Motion to Intervene is DENIED.

2. Intervenor IELHC's Petition for Rehabilitation is DENIED.

3. Petitioner's Petition for Liquidation is GRANTED.

4. Pursuant to H.R.S. § 431:15-307(d) IEL is hereby determined and declared to be insolvent within the meaning of H.R.S. § 431:15-103(a)(10)(B).

5. Pursuant to H.R.S. § 431:15-106, any past or present officer, manager, director, trustee, owner, employee, or agent of IEL or any other persons with authority over, or in charge of any segment of the IEL's affairs, shall cooperate with the Liquidator in this proceeding and other proceedings under Article 15 of Chapter 431 of the Hawaii Revised Statutes ("Article 15"), including any investigation preliminary to this or other proceedings under such Article. Such cooperation shall include, but shall not be limited to the following:

(a) To reply promptly in writing to any inquiry from the Liquidator or his representatives requesting such a reply; and

(b) To make available and deliver to the Liquidator or his representatives any books, accounts, documents, or other records, or information or property of or pertaining to IEL and in its possession, custody or control.

No person shall obstruct or interfere with the Liquidator or his representatives in the conduct of any

delinquency proceeding or investigation preliminary or incident thereto.

6. IEL is in such condition that the further transaction of business would be hazardous, financially, to its policyholders and creditors or the public and that the interests of policyholders and creditors of IEL or the public may be endangered if a liquidation order is delayed.

7. Attempts to rehabilitate IEL would be futile and/or rehabilitation would serve no useful purpose.

8. Pursuant to H.R.S. § 431:15-307, IEL shall be liquidated under the supervision of the Petitioner.

9. The Petitioner, and his successors in office, are hereby appointed Liquidator of IEL and he is hereby authorized and directed forthwith to take possession of the assets of IEL, and administer them under the general supervision of the court.

10. The Petitioner is vested by operation of law with the title to all of the property, contracts, and rights of action and all of the books and records of IEL, wherever located.

11. The rights and liabilities of IEL and of its creditors, policyholders, shareholders, members and all other persons interested in its estate shall become fixed as of the date of entry of this Liquidation Order, except as provided in H.R.S. § 431:15-308 and § 431:15-327.

12. Pending further order of the Court, IEL, its agents, servants, employees, officers, directors, shareholders, all persons acting in concert or participation with IEL or such persons, are hereby permanently restrained and enjoined from:

(a) The transaction of further business with respect to IEL;

(b) The transfer of any property to or from IEL;

(c) Interference with the Liquidator or with any proceedings under Article 15;

(d) Waste of IEL's assets;

(e) Dissipation and/or transfer of bank accounts;

(f) The institution or further prosecution of any actions or proceedings;

(g) The obtaining of preferences, judgments, attachments, garnishments or liens against IEL, its assets or policyholders;

(h) The levying of execution against IEL;

(i) The making of any sale or deed for nonpayment of taxes or assessments that would lessen the value of the assets of IEL;

(j) The withholding from the Liquidator of books, accounts, documents, or other records relating to the business of IEL; and/or

(k) Any other threatened or contemplated action that might lessen the value of the IEL's assets or prejudice the right or policyholders, creditors, or shareholders, or the administration of any proceeding under Article 15.

13. Pursuant to H.R.S. § 431:15-310, the Court approves the Liquidator's appointment of the law firms of McCorriston Miho Miller Mukai and LeBoeuf, Lamb, Greene & MacRae as counsel to the Liquidator.

14. Pursuant to H.R.S. § 431:15-310, the Court approves the Liquidator's appointment of Coopers and Lybrand as accountants for the Liquidator.

15. Pursuant to H.R.S. § 431:15-310, the Court approves the Liquidator's appointment of Analysis Group, Inc. and Peterson Consulting as special consultants for the Liquidator.

16. The Liquidator of IEL shall have all of the powers provided under H.R.S. § 431:15-310, including but not limited to, the powers to affirm, reject, cancel, void, stay, postpone, modify, amend or otherwise deal with any and all rights, actions, benefits, duties, and obligations, whether written or oral, corporeal or incorporeal, real, personal, or mixed.

17. The Liquidator shall provide accountings to the court with respect to the liquidation proceedings on a regular basis, but in no event less often than every six months or such other period as shall subsequently be specified by the Court.

18. Entry of this Liquidation Order shall not constitute an anticipatory breach of any contracts of IEL, including without limitation any contract, treaty or policy of reinsurance, nor operate in any respect to reduce amounts recoverable from reinsurers of IEL or others.

19. The Liquidator shall present to this Court for its approval a plan to distribute assets within 120 days of the entry of the Liquidation Order.

20. All state guaranty associations may impose to the extent necessary or appropriate temporary moratoriums, deferrals or liens, either in full or in part, on payments of claims, benefits, cash values, surrenders, policy loans, or any

other right to withdraw funds held in conjunction with the policies or contracts of IEL, in addition to implementing any contractual provision for deferral of cash payments or policy loans.

21. Insurance policies and annuities shall continue in force as follows:

(a) All policies, other than life or health insurance or annuities, in effect at the time of issuance of an order of liquidation shall continue in force only for the lesser of:

(1) A period of thirty days from the date of entry of this Liquidation Order;

(2) The expiration of the policy coverage;

(3) The date when the insured has replaced the insurance coverage with equivalent insurance in another insurer or otherwise terminated the policy; or

(4) The date on which the Liquidator has effected a transfer of the policy obligation pursuant to H.R.S. § 431:15-310(a)(8).

(b) Policies of life or health insurance or annuities shall continue in force for such period and under such terms as is provided for by any applicable guaranty fund or association, or foreign guaranty fund or association. Policies of life or health insurance or annuities or any period of coverage of such policies not covered by a guaranty fund or association or foreign guaranty fund or association shall terminate pursuant to the preceding subparagraph (a) of this paragraph of this Liquidation Order.

(c) Policyholders of IEL who are covered by the Hawaii Life and Disability Insurance Guaranty Association or any similar entity shall continue to make premium payments to the Liquidator, who shall hold such premiums on behalf of the Hawaii Life and Disability Insurance Guaranty Association, until the Hawaii Life and Disability Insurance Guaranty Association or similar entity provides notice otherwise. The Liquidator shall deposit or distribute or cause to be deposited or distributed those premiums consistent with the instructions of the Hawaii Life and Disability Insurance Guaranty Association or similar entity. Any premiums paid by policyholders to the Hawaii Life and Disability Insurance Guaranty Association for any policy or portion of a policy that exceeds the coverage provided by Article 16, Part II of Chapter 431 shall be accounted for by the Association and refunded to the policyholder within a reasonable period of time.

(d) All reinsurance contracts, or similar agreements, shall remain in full force and effect in the discretion of the Liquidator.

22. The Liquidator shall give or cause to be given notice of this Liquidation Order as soon as practicable in compliance with H.R.S. § 431:15-311.

23. No action at law or equity shall be brought against IEL or the Liquidator, whether in the State of Hawaii or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of this Liquidation Order, except as provided in Chapter 431 of the Hawaii Revised Statutes.

24. Upon issuance of this Liquidation Order, the rehabilitation of IEL shall cease, and IEL shall be placed in liquidation.

DATED: Honolulu, Hawaii, December 29, 1994.

/s/ P. Yim (Seal)
JUDGE OF THE ABOVE-ENTITLED COURT

Lawrence M. Reifurth, vs. Investors Equity Life Insurance Company of Hawaii, Ltd., S.P. No. 94-0337 (Special Proceeding): **Findings of Fact, Conclusions of Law, and Order**

APPENDIX D

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

S.P. No. 94-0337
(Special Proceeding)

LAWRENCE M. REIFURTH,
Insurance Commissioner of the State of Hawaii,

Petitioner,

v.

INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., a Hawaii corporation,

Respondent.

JUDGMENT

Pursuant to the Findings of Fact, Conclusions of Law and Order filed on December 29, 1994, Judgment is hereby entered in favor of Petitioner LAWRENCE M. REIFURTH, Insurance Commissioner of the State of Hawaii and against Respondents INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., and INVESTORS EQUITY LIFE HOLDING COMPANY,

Wherefore, the aforementioned Order, filed on December 29, 1994, attached hereto as exhibit "A", and contained in pages 24-30 of Exhibit "A", is incorporated herein by reference.

DATED: Honolulu, Hawaii, January 27, 1995.

APPROVED AND SO ORDERED:

/s/
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

McCorriston Miho Miller Mukai
JERROLD Y. CHUN, ESQ.

Attorneys for Petitioner

GERALD C. YOSHIDA, ESQ.

Attorneys for Respondent
INVESTORS EQUITY LIFE INSURANCE
COMPANY OF HAWAII, LTD.

JOHN FRANCIS PERKIN, ESQ.

Attorneys for Respondent-Intervenor
INVESTORS EQUITY LIFE HOLDING COMPANY

GLENN K. SATO, ESQ.

Attorneys for Some Officers and
Directors of INVESTORS EQUITY
LIFE INSURANCE COMPANY OF HAWAII, LTD.

Lawrence M. Reifurth, Insurance Commissioner of the State of Hawaii vs. Investors Equity Life Insurance Company of Hawaii, Ltd.
S.P. No. 94-0337
JUDGMENT

APPENDIX E

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

S.P. No. 94-0337
(Special Proceeding)

LAWRENCE M. REIFURTH,
Insurance Commissioner of the State of Hawaii,

Petitioner,

VS.

INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD.,

Respondent.

SEIZURE ORDER

This matter came on for consideration, ex parte, before the undersigned on this date, on the petition of Lawrence M. Reifurth, Insurance Commissioner of the State of Hawaii, (hereafter "Commissioner"), for a seizure order pursuant to H.R.S. § 431:15-202. Petitioning Commissioner appeared by Deputy Attorney General David A. Webber and William C. McCorriston, Esq., Jerrold Y. Chun, Esq. and John Y. Yamano, Esq. Pursuant to H.R.S. § 431-15-202, the proceedings were ex parte and accordingly, no appearance was made by respondent.

Based upon the Commissioner's showing, through the petition and supporting affidavits, the court finds that grounds exist which would justify a court order for formal delinquency proceedings against respondents under H.R.S. §§ 431:15-301 or 431:15-306, and further finds that the interests of policyholders, creditors or the public will be endangered by delay.

The Commissioner having satisfied the requirements of H.R.S. § 431:15-202 for the entry forthwith of a seizure order, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Commissioner is hereby authorized and directed to take possession and control of all of the property, books, accounts, documents and other records of respondent insurer, Investor Equity Life Insurance Company of Hawaii, Ltd. ("IEL"), and of the premises occupied by it for transaction of its business, located principally at 677 Ala Moana Blvd., PH, Honolulu, Hawaii 96813-5419.

2. Until further order of the court, respondent-IEL and its officers, managers, agents, and employees, are hereby enjoined from disposition of any of the property of IEL and from transaction of IEL's business except with the written consent of the Commissioner.

3. This Seizure Order shall be immediately effective, and shall expire on the 5th of August, 1994, at 4:00 p.m., unless previously extended by the court, or vacated by an order pursuant to H.R.S. § 431:15-301 or § 431:15-306.

4. Pursuant to H.R.S. § 431:15-203, all proceedings and records herein, and all records of the

insurer, other documents, and all files, court records, and papers of the insurance division of the Department of Commerce and Consumer Affairs, so far as they pertain to or are a part of the record of the proceedings under H.R.S. § 431:15-202, shall be and remain confidential, except as is necessary to obtain compliance with this order or other applicable law, until the court orders otherwise after hearing arguments from the parties in chambers.

DATED: Honolulu, Hawaii, June 22, 1994

/s/ P. Yim (Seal)
JUDGE OF THE ABOVE-ENTITLED COURT

Lawrence M. Reifurth, vs. Investors Equity Life Insurance Company of Hawaii, Ltd., S.P. No. 94-0337:
SEIZURE ORDER

APPENDIX F

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

S.P. No. 94-0337
(Special Proceeding)

LAWRENCE M. REIFURTH,
Insurance Commissioner of the State of Hawaii,

Petitioner,

v.

INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., a Hawaii corporation,

Respondent.

ORDER TO SHOW CAUSE

This Court, having considered the petition of the Insurance Commissioner of the State of Hawaii (hereafter "Commissioner"), for an order authorizing and directing the Commissioner to rehabilitate the respondent insurer, pursuant to H.R.S. § 431:15-301, *et seq.*, as well as the affidavits and exhibits attached thereto; and it appearing to the Court that good cause for the relief requested has been shown;

IT IS HEREBY ORDERED that Respondent insurer Investors Equity Life Insurance Company of Hawaii, Ltd. ("IEL") appear and show cause before me at 2:00 p.m. on June 24, 1994, at the First Circuit Court, Kaahumanu Hale,

777 Punchbowl Street, 4th Floor, Honolulu, Hawaii 96813, or as soon thereafter as counsel may be heard, as to why a rehabilitation order in the form attached hereto as Exhibit "A" should not is issued.

IT IS HEREBY ORDERED that a copy of the Petition for Ex Parte Seizure Order Pursuant to H.R.S. § 431:15-202 and for Rehabilitation of a Domestic Insurer Pursuant to H.R.S. § 431:15-301; Exhibits "1" and "2"; Affidavit of Lawrence M. Reifurth; Affidavit of Timothy P. Bogan; Exhibits "A" - "C", and of this Order, be served by Sheriff on Respondent IEL, 677 Ala Moana PH, Honolulu, 96813 prior to the hearing on the above Order to Show Cause.

DATED: Honolulu, Hawaii, June 22, 1994.

/s/ P. Yim (Seal)
JUDGE OF THE ABOVE-ENTITLED COURT

Lawrence M. Reifurth, vs. Investors Equity Life Insurance Company of Hawaii, Ltd., S.P. No. 94-0337: ORDER TO SHOW CAUSE

APPENDIX G

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

S.P. No. 94-0337
(Special Proceeding)

LAWRENCE M. REIFURTH,
Insurance Commissioner of the State of Hawaii,

Petitioner,

VS.

INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., a Hawaii corporation,

Respondent.

STIPULATED REHABILITATION ORDER

IT IS HEREBY STIPULATED by and between Petitioner LAWRENCE M. REIFURTH, Insurance Commissioner of the State of Hawaii, and Respondent INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD. ("IEL"), through their authorized agents, that:

1. Pursuant to H.R.S. § 431:15-301, adequate grounds exist for the entry of a Rehabilitation Order ("Order").

2. The Commissioner, and his successors in office, are hereby appointed Rehabilitator of Respondent IEL and he is hereby authorized and directed forthwith to take possession of the assets of Respondent IEL, and administer them under the general supervision of the court.

3. The Rehabilitator may appoint one or more special deputies, pursuant to H.R.S. § 431:15-303, who shall have all the powers and responsibilities of the Rehabilitator, and may employ such counsel, clerks, and assistants as deemed necessary. The Commissioner shall file notice with the court of the appointment of such special deputy or special deputies and obtain court approval of their compensation.

4. Hiram Y. Tanaka is hereby appointed Special Deputy Rehabilitator of Respondent IEL, and the law firm of McCorriston Miho Miller Mukai is hereby appointed as counsel in this proceeding.

5. The Commissioner, as Rehabilitator, and such special deputies as he may appoint, shall have all of the powers and duties granted to the Rehabilitator by Hawaii Revised Statutes, Chapter 431, or otherwise provided by law or further orders of this court.

6. The Rehabilitator may pay administrative expenses, including but not limited to the compensation of the special deputy, counsel, clerks, and assistants and all expenses of taking possession of the insurer and of conducting the proceedings, out of the assets of Respondent IEL as the Rehabilitator deems reasonable and appropriate.

7. The Rehabilitator of Respondent IEL shall have all of the powers provided under H.R.S. § 431:15-303, including but not limited to, the powers to affirm, reject, cancel, void, stay, postpone, or otherwise deal with any and all rights, actions, benefits, duties, and obligations, whether

written or oral, corporeal or incorporeal, real, personal, or mixed.

8. The Rehabilitator shall provide accountings to the court with respect to the rehabilitation proceedings on a regular basis as deemed reasonable and appropriate by the court.

9. Entry of this Order shall not constitute an anticipatory breach of any contracts of the respondent insurer.

10. The Rehabilitator is authorized to give notice to creditors or other interested parties of any judicial proceedings by first class mail, hand delivery, facsimile transmission, or publication in a newspaper of general circulation in such locations as the Rehabilitator deems appropriate, where notice is required by law or deemed appropriate by the Rehabilitator. The Rehabilitator shall have the right and power to choose the method of notice which is most practicable under the circumstances.

11. All actions or proceedings in which Respondent IEL is a party which are pending, or which are subsequently initiated, in the State of Hawaii, are stayed for a period of 90 days from the date of this Order, except that the Rehabilitator may pay benefits as they become due if such payments are reasonable and appropriate under the circumstances, and are consistent with the rehabilitation proceeding.

12. The parties have freely entered into this stipulation and do not contest the issuance of the Order.

13. IEL has agreed to an immediate rehabilitation in the best interests of its policyholders, creditors, and/or to the public, and is willing to cooperate with the Commissioner on such a Rehabilitation.

14. The Rehabilitator agrees to serve copies of all pleadings, accountings, reports, and other filings in such manner as shall be designated in writing by Investors Equity Life Holding Company, the sole owner of IEL, and to provide promptly such information and documents as it may reasonable request.

15. The undersigned have authority to enter into this agreement and such agreement is binding upon Respondents.

DATED : Honolulu, Hawaii, Jun. 24, 1994

PETITIONER:

LAWRENCE M. REIFURTH

/s/ Lawrence M. Reifurth
INSURANCE COMMISSIONER of the
STATE OF HAWAII

RESPONDENTS:
INVESTORS EQUITY LIFE INSURANCE
COMPANY OF HAWAII, LTD.

BY: /s/ Kurtis B. Bray
ITS PRESIDENT

INVESTORS EQUITY LIFE HOLDING
COMPANY

BY: /s/ Gary Vose Pres.
ITS

APPROVED AS TO FORM BY COUNSEL
FOR RESPONDENT INVESTORS EQUITY LIFE
INSURANCE COMPANY OF HAWAII, LTD.:

/s/ Gerald C. Yoshida
GERALD C. YOSHIDA

APPROVED AND SO ORDERED:

/s/ P. Yim
JUDGE OF THE ABOVED-ENTITLED COURT

Lawrence M. Reifurth vs. Investors Equity Life Insurance Company of Hawaii, Ltd., S.P. No. 94-0337:
STIPULATED REHABILITATION ORDER

APPENDIX H

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

S.P. No. 94-0337
(Special Proceeding)

LAWRENCE M. REIFURTH,
Insurance Commissioner of the State of Hawaii,

Petitioner,

vs.

INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., a Hawaii corporation,

Respondent.

STIPULATION TO ALLOW INTERVENTION OF INVESTORS EQUITY LIFE HOLDING COMPANY AND ORDER

IT IS HEREBY STIPULATED AND AGREED by and between Petitioner LAWRENCE M. REIFURTH, Insurance Commissioner of the State of Hawaii, in his capacity as the Rehabilitator of Investors Equity Life Insurance Company Of Hawaii, Ltd., Respondent INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD., a Hawaii corporation, and INVESTORS EQUITY LIFE HOLDING COMPANY, a Delaware

corporation, that INVESTORS EQUITY LIFE HOLDING COMPANY shall have leave to intervene as a party-Respondent in all matters in this proceeding.

All appearing parties have signed this stipulation.

DATED: Honolulu, Hawaii, Aug. 10, 1994.

APPROVED AND SO ORDERED:

/s/ P. Yim (Seal)
Judge of the Above Entitled Court

/s/ Gerald C. Yoshida
Gerald C. Yoshida
Attorney for Respondent
INVESTORS EQUITY LIFE INSURANCE
COMPANY OF HAWAII, LTD.

/s/ John Y. Yamano
WILLIAM C. McCORRISTON
JERROLD Y. CHUN
JOHN Y. YAMANO
Attorneys for Petitioner
LAWRENCE M. REIFURTH,
Insurance Commissioner of the State of Hawaii
in his capacity as the Rehabilitator of IEL

/s/ John F. Perkin
JOHN F. PERKIN
LYLE S. HOSODA
Attorneys for Intervenor
INVESTORS EQUITY LIFE
HOLDING COMPANY

LAWRENCE M. REIFURTH, Insurance Commissioner of the State of Hawaii vs. INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD.
S.P. No. 94-0337
STIPULATION TO ALLOW INTERVENTION OF INVESTORS EQUITY LIFE HOLDING COMPANY AND ORDER

APPENDIX I

DISPOSITION OF MOTION/MATTER TAKEN UNDER ADVISEMENT

DATE:	September 22, 1994
CASE:	Lawrence M. Reifurth, Insurance Commissioner of the State of Hawaii v. Investors Equity Life Insurance Company of Hawaii, Ltd.
CASE NO.:	S.P. 94-0337
MOTION/MATTER TAKEN UNDER ADVISEMENT:	Petition For Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd.
HEARING DATE:	August 15, 16, 1994/September 2, 6, 19, 1994

APPEARANCE:

*Jerrold Chun, Esq.
John Yamano, Esq.
McCORRISTON MIHO
MILLER MUKAI

David Reber, Esq.
GOODSILL ANDERSON
QUINN & STIFEL

John Perkin, Esq.
Mark Au, Esq.
Joseph Hegedus, Esq.
PERKIN & HOSODA

Benjamin Cassiday III, Esq.
LAW OFFICES

Glenn Sato, Esq.
Ward Fujimoto, Esq.
FUJIYAMA DUFFY &
FUJIYAMA

Gerald Yoshida, Esq.
CHAR HAMILTON
CAMPBELL & THOM

Jeffrey Portnoy, Esq.
Blane Yokota, Esq.
CADES SCHUTTE
FLEMING & WRIGHT

Paul Sato, Esq.
Kerry Komatsubara, Esq.
FURUTANI SATO
KOMATSU BARA

* The prevailing party is to prepare the order and circulate for signatures to all those parties appearing at the hearing or whose positions were represented at the hearing.

Based upon due consideration of the motion and/or memoranda filed in this matter and for good cause shown, this Court hereby:

XXX **GRANTS this motion.** ____ **DENIES this motion.**

____ **GRANTS the motion in part, DENIES the motion in part.**

The Court grants the Petition for Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd. submitted by the Petitioner, Lawrence M. Reifurth, filed 08/05/94. Parties shall submit proposed findings of fact and conclusions of law pursuant to H.R.S. 431:15-307(d). All stays previously in effect are effectively set aside upon entry of this minute order.

THE HONORABLE PATRICK K.S.L. YIM

/s/ Patrick K.S.L. Yim

APPENDIX J

RELEVANT PROVISIONS OF HAWAII'S REHABILITATION AND LIQUIDATION ACT

---

§ 431:15-101 Construction and purpose.

(a) This article shall be cited as the Insurers Supervision, Rehabilitation and Liquidation Act.

(b) This article shall not be interpreted to limit the powers granted the commissioner by other provisions in this code.

(c) This article shall be liberally construed to effect the purpose stated in subsection (d).

(d) The purpose of this article is the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers, through:

(1) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures;

(2) Improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry;

(3) Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation;

(4) Equitable apportionment of any unavoidable loss;

(5) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this State; and

(6) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

§ 431:15-202 Court's seizure order.

(a) The commissioner may file in the circuit court of the first judicial circuit of this State a petition alleging, with respect to a domestic insurer:

(1) That there exist any grounds that would justify a court order for a formal delinquency proceeding against an insurer under section 431:15-301 or section 431:15-306;

(2) That the interests of policyholders, creditors or the public will be endangered by delay; and

(3) The contents of an order deemed necessary by the commissioner.

(b) Upon a filing under subsection (a), the court may issue forthwith, ex parte and without a hearing, the requested order which shall direct the commissioner to take possession and control of all or a part of the property, books, accounts, documents, and other records of the insurer, and of the premises occupied by it for transaction of its business, and until further order of the court, enjoin the insurer and its officers, managers, agents, and employees from disposition

of its property and from transaction of its business except with the written consent of the commissioner.

(c) The court shall specify in the order what its duration shall be, which shall be the time as the court deems necessary for the commissioner to ascertain the condition of the insurer. On motion of either party or on its own motion, the court from time to time may hold such hearings as it deems desirable after such notice as it deems appropriate, and may extend, shorten or modify the terms of the seizure order. The court shall vacate the seizure order if the commissioner fails to commence a formal proceeding under section 431:15-301 or section 431:15-306 after having had a reasonable opportunity to do so. An order of the court pursuant to a formal proceeding under section 431:15-301 or section 431:15-306 shall vacate the seizure order.

(d) Entry of a seizure order under this section shall not constitute an anticipatory breach of any contract of the insurer.

(e) An insurer subject to an ex parte order under this section may petition the court at any time after the issuance of the order for a hearing and review of the order. The court shall hold the hearing and review not more than fifteen days after the request. A hearing under this subsection may be held privately in chambers and it shall be so held if the insurer proceeded against so requests.

(f) If, at any time after the issuance of an order, it appears to the court that any person whose interest is or will be substantially affected by the order did not appear at the hearing and has not been served, the court may order that notice be given. An order that notice be given shall stay the effect of an order previously issued by the court.

§ 431:15-301 Grounds for rehabilitation.

(a) The commissioner may apply by petition to the circuit court of the first judicial circuit for an order authorizing the commissioner to rehabilitate a domestic insurer or an alien insurer domiciled in this State, on any one or more of the following grounds whenever the commissioner reasonably believes that the insurer may be successfully rehabilitated without substantial increase in the risk of loss to the insurer's policyholders, creditors, or to the public:

(1) The insurer is insolvent;

(2) The insurer is in such condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors or the public;

(3) There is reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer's assets, forgery or fraud affecting the insurer, or other illegal conduct in, by, or with respect to the insurer that if established would endanger assets in an amount threatening the solvency of the insurer;

(4) The insurer has failed to remove any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employee, or other person, if the person has been found after notice and hearing by the commissioner to be dishonest or untrustworthy in a way affecting the insurer's business;

(5) Control of the insurer, whether by stock ownership or otherwise, and whether direct or indirect, is in a person or persons found after notice and hearing to be untrustworthy;

(6) Any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, director or trustee, employee, or other person, has refused to be examined under oath by the commissioner concerning its affairs, whether in this State or elsewhere, and after reasonable notice of the fact the insurer has failed promptly and effectively to terminate the employment and status of the person and all such person's influence on management;

(7) After demand by the commissioner under article 2 or under this article, the insurer has failed to promptly make available for examination any of its own property, books, accounts, documents, or other records, or those of any subsidiary or related company within the control of the insurer, or those of any person having executive authority in the insurer so far as they pertain to the insurer;

(8) Without first obtaining the written consent of the commissioner, the insurer has transferred, or attempted to transfer, in a manner contrary to article 11 or section 431:3-215, substantially its entire property or business, or has entered into any transaction the effect of which is to merge, consolidate or reinsure substantially its entire property or business in or with the property or business of any other person;

(9) The insurer or its property has been or is the subject of an application for the appointment of a receiver, trustee, custodian, conservator, or sequestrator, or similar fiduciary of the insurer or its property, otherwise than as authorized under the insurance laws of this State, and such appointment has been made or is imminent, and such appointment might oust the courts of this State of jurisdiction or might prejudice orderly delinquency proceedings under this article;

(10) Within the previous four years the insurer has willfully violated its charter or articles of incorporation, its bylaws, any insurance law of this State, or any valid order of the commissioner under section 431:15-201;

(11) The insurer has failed to pay within sixty days after due date any obligation to any state or any subdivision thereof or any judgment entered in any state, if the court in which such judgment was entered had jurisdiction over such subject matter, except that such nonpayment shall not be a ground until sixty days after any good faith effort by the insurer to contest the obligation has been terminated, whether it is before the commissioner or in the courts, or the insurer has established general business practices which attempt to compromise or renegotiate previously agreed settlements with its creditors on the ground that it is financially unable to pay its obligations in full;

(12) The insurer has failed to file its annual report or other financial report required by statute

within the time allowed by law and, after written demand by the commissioner, has failed to give an adequate explanation immediately; or

(13) The board of directors or the holders of a majority of the shares entitled to vote, or a majority of those individuals entitled to the control of those entities request or consent to rehabilitation under this article.

(b) Nothing herein contained shall be construed as creating or enlarging any of the duties of the guaranty associations as may be set forth in article 16.

§ 431:15-302 Rehabilitation orders.

(a) An order to rehabilitate the business of a domestic insurer, or an alien insurer domiciled in this State, shall appoint the commissioner and the commissioner's successors in office the rehabilitator, and shall direct the rehabilitator forthwith to take possession of the assets of the insurer, and to administer them under the general supervision of the court. The filing or recording of the order with the clerk of the circuit court of the first judicial circuit or at the bureau of conveyances, shall impart the same notice as evidence of title. The order to rehabilitate the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator.

(b) Any order issued under this section shall require accounting to the court by the rehabilitator. Accountings shall be at such intervals as the court specifies in its order.

(c) Entry of an order of rehabilitation shall not constitute an anticipatory breach of any contracts of the insurer.

§ 431:15-305 Termination of rehabilitation.

(a) Whenever the commissioner believes further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors, policyholders or the public, or would be futile, the commissioner may petition the circuit court of the first judicial circuit for an order of liquidation. A petition under this subsection shall have the same effect as a petition under section 431:15-306. The court shall permit the directors of the insurer to take such actions as are reasonably necessary to defend against the petition and may order payment from the estate of the insurer of such costs and other expenses of defense as justice may require.

(b) The rehabilitator may at any time petition the court for an order terminating rehabilitation of an insurer. The court shall also permit the directors of the insurer to petition the court for an order terminating rehabilitation of the insurer, and may order payment from the estate of the insurer of such costs and other expenses of such petition as justice may require. If the court finds that rehabilitation has been accomplished and that grounds for rehabilitation under section 431:15-301 no longer exist, it shall order that the insurer be restored to possession of its property and the control of its business. The court may also make that finding and issue that order at any time upon its own motion.

§ 431:15-306 Grounds for liquidation.

The commissioner may petition the circuit court of the first judicial circuit for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this State on any ground on which the commissioner may apply for an order of rehabilitation under section 431:15-301, whenever the commissioner believes that attempts to rehabilitate the insurer would substantially increase the risk of loss to its creditors, its policyholders or the public, or would be futile, or that rehabilitation would serve no useful purpose, whether or not there has been a prior order directing the rehabilitation of the insurer.

§ 431:15-307 Liquidation orders.

(a) An order to liquidate the business of a domestic insurer shall appoint the commissioner and the commissioner's successors in office liquidator, and shall direct the liquidator forthwith to take possession of the assets of the insurer and to administer them under the general supervision of the court. The liquidator shall be vested by operation of law with the title to all of the property, contracts, and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the entry of the final order of liquidation. The filing or recording of the order with the clerk of the circuit court of the first judicial circuit and at the bureau of conveyances shall impart the same notice as evidence of title.

(b) Upon issuance of the order, the rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members and all other persons

interested in its estate shall become fixed as of the date of entry of the order of liquidation, except as provided in section 431:15-308 and section 431:15-327.

(c) An order to liquidate the business of an alien insurer domiciled in this State shall be in the same terms and have the same legal effect as an order to liquidate a domestic insurer, except that the assets and the business in the United States shall be the only assets and business included therein.

(d) At the time of petitioning for an order of liquidation, or at any time thereafter, the commissioner, after making appropriate findings of an insurer's insolvency may petition the court for a judicial declaration of such insolvency. After providing such notice and hearing as it deems proper the court may make the declaration.

(e) Any order issued under this section shall require accounting to the court by the liquidator. Accountings shall be at such intervals as the court specifies in its order.

§ 431:15-332 Priority of distribution.

The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class. The order of distribution of claims shall be:

. . . .

(l) Class 9. The claims of shareholders or other owner.

APPENDIX K

RELEVANT PROVISIONS OF HAWAII'S INSURANCE CODE

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§ 431:11-102 Definitions.

As used in this article, unless the context shall otherwise require: "Affiliate" (including affiliate of, or person affiliated with, a specific person) means a person that, directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

"Control" (including controlling, controlled by, and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person.

(1) Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten per cent or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by section 431:11-105(k) that control does not in fact exist.

(2) The commissioner may determine, after furnishing all persons in interest notice and

opportunity to be heard and making specific finds of fact to support the commissioner's determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

"Insurance holding company system" consists of two or more affiliated persons, one or more of which is an insurer.

"Insurer" shall have the same meaning as set forth in article 1, except that it shall not include:

(1) Agencies, authorities, or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state;

(2) Fraternal benefit societies;

(3) Nonprofit medical and hospital service associations; or

(4) Unauthorized insurers. "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, and any similar entity or any combination of the foregoing acting in concert, but shall not include any joint venture partnership exclusively engaged in owning, managing, leasing, or developing real or tangible personal property, or a securities broker performing only the usual and customary broker's function.

"Security holder" of a specified person means one who owns any security of the person, including common stock, preferred stock, debt obligations, and any other

security convertible into or evidencing the right to acquire any of the foregoing.

"Subsidiary of a specified person" means an affiliate controlled by the person directly or indirectly through one or more intermediaries.

"Voting security" shall include any security convertible into or evidencing a right to acquire a voting security.

§ 431:16-206 Creation of the association.

(a) There is created a nonprofit legal entity to be known as the Hawaii Life and Disability Insurance Guaranty Association. All member insurers shall be and remain members of the association as a condition of their authority to transact insurance in this State. The association shall perform its functions under the plan of operation established and approved under section 431:16-210 and shall exercise its powers through a board of directors established under section 431:16-207. For purposes of administration and assessment the association shall maintain three accounts:

(1) The life insurance account;

(2) The disability insurance account; and

(3) The annuity account.

(b) The association shall come under the immediate supervision of the commissioner and shall be subject to the applicable provisions of the insurance laws of this State.

§ 431:16-208 Powers and duties of the association.

. . . .

(l) The association shall have standing to appear before any court in this State with jurisdiction over an impaired or insolvent insurer concerning which the association is or may become obligated under this part. Such standing shall extend to all matters germane to the powers and duties of the association, including, but not limited to, proposals for reinsuring, modifying or guaranteeing the policies or contracts of the impaired or insolvent insurer and the determination of the policies or contracts and contractual obligations. The association shall also have the right to appear or intervene before a court in another state with jurisdiction over an impaired or insolvent insurer for which the association is or may become obligated or with jurisdiction over a third party against whom the association may have rights through subrogation of the insurer's policyholders.

Supreme Court, U.S.
FILED
MAY 22 1996
CLERK

No. 95-1712

In The

Supreme Court of the United States

October Term, 1995

INVESTORS EQUITY LIFE HOLDING COMPANY,

Petitioner,

v.

WAYNE C. METCALF, INSURANCE COMMISSIONER OF THE STATE OF HAWAII; INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD.; and HAWAII LIFE AND DISABILITY INSURANCE GUARANTY ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review the Hawaii Supreme Court's determination that, under Hawaii law, the sole shareholder of a Hawaii insurance company does not have standing to oppose a petition to liquidate the insurance company?

STATEMENT REGARDING THE PARTIES AND REGARDING CORPORATE PARENTS AND SUBSIDIARIES

Named parties to the appeal to the Supreme Court of the State of Hawaii were: Wayne C. Metcalf, Insurance Commissioner of the State of Hawaii; Investors Equity Life Insurance Company of Hawaii, Ltd. ("IEL"); and Investors Equity Life Holding Company ("IELHC"). Although it was not a named party below, Respondent Hawaii Life and Disability Insurance Guaranty Association (the "Association") exercised its statutory authority pursuant to HAW. REV. STAT. § 431:16-208(1) (1993) to appear in the proceedings before the circuit court and the Hawaii Supreme Court. *See* Appendix A-1, n.1, and C-2.[1] For purposes of economy and the Court's convenience, Commissioner Metcalf (in his capacity as Liquidator of IEL) and the Association are filing this brief jointly; however, they reserve their right to appear and proceed separately in any further proceedings.

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[1] The Association was created by the Hawaii legislature through the enactment of the Hawaii Life and Disability Insurance Guaranty Association Act, HAW. REV. STAT. § 431:16 – 201 *et seq.* ("Association Act"). Appendix C-4. The Association Act established the Association for the purpose of protecting policyholders under life and disability insurance policies and annuity contracts in the event of the impairment or insolvency of life insurance companies licensed in Hawaii. *Id.*, C-5. Under the Association Act, upon the entry of an order of liquidation containing a finding of insolvency, the Association becomes obligated, subject to certain limitations, to provide continuing coverage for policyholders of the insolvent insurer. *Id.* As a result of the insolvency of IEL, the Association became obligated to provide continuing coverage for IEL's policyholders.

STATEMENT REGARDING THE PARTIES AND REGARDING CORPORATE PARENTS AND SUBSIDIARIES – Continued

Pursuant to Supreme Court Rule 29.6, Respondents state that Petitioner Investors Equity Life Holding Company is the parent and sole shareholder of Respondent IEL.

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APPLICABLE CONSTITUTIONAL PROVISION AND STATE STATUTES

Section 1 of the Fourteenth Amendment to the United States Constitution states in part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Relevant provisions from the Hawaii Insurers Supervision, Rehabilitation and Liquidation Act, HAW. REV. STAT. § 431:15-101 *et seq.*, are:

§ 431:15-101:

* * *

> (c) This article shall be liberally construed to effect the purpose stated in subsection (d).
>
> (d) The purpose of this article is the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers. . . .

§ 431:15-104(c):

> No court of this State has jurisdiction to entertain, hear or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of any insurer, or praying for an injunction or restraining order or other relief preliminary to,

incidental to, or relating to that type of proceedings other than in accordance with this article.

§ 431:15-301:

(a) The commissioner may apply by petition to the circuit court of the first judicial circuit for an order authorizing the commissioner to rehabilitate a domestic insurer or an alien insurer domiciled in this State, on any one or more of the following grounds whenever the commissioner reasonably believes that the insurer may be successfully rehabilitated without substantial increase in the risk of loss to the insurer's policyholders, creditors, or to the public. . . .

(1) The insurer is insolvent;

(2) The insurer is in such condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors or the public.

§ 431:15-302:

(a) An order to rehabilitate the business of a domestic insurer, or an alien insurer domiciled in this State, shall appoint the commissioner and the commissioner's successors in office the rehabilitator, and shall direct the rehabilitator forthwith to take possession of the assets of the insurer, and to administer them under the general supervision of the court.

§ 431:15-303(d):

If the rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is

appropriate, the rehabilitator shall prepare a plan to effect such changes.

§ 431:15-305(a):

Whenever the commissioner believes further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors, policyholders or the public, or would be futile, the commissioner may petition the circuit court of the first judicial circuit for an order of liquidation. . . . The court shall permit the directors of the insurer to take such actions as are reasonably necessary to defend against the petition and may order payment from the estate of the insurer of such costs and other expenses of defense as justice may require.

§ 431:15-306:

The commissioner may petition the circuit court of the first judicial circuit for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this State on any ground on which the commissioner may apply for an order of rehabilitation under section 431:15-301, whenever the commissioner believes that attempts to rehabilitate the insurer would substantially increase the risk of loss to its creditors, its policyholders or the public, or would be futile, or that rehabilitation would serve no useful purpose, whether or not there has been a prior order directing the rehabilitation of the insurer.

§ 431:15-307(d):

At the time of petitioning for an order of liquidation, or at any time thereafter, the commissioner, after making appropriate findings of an

> insurer's insolvency, may petition the court for a judicial declaration of such insolvency. After providing such notice and hearing as it deems proper the court may make the declaration.

STATEMENT OF THE CASE

Investors Equity Life Insurance Company of Hawaii, Ltd. ("IEL") is a Hawaii insurance company that was authorized to sell life insurance and annuities only in Hawaii. IEL is subject to the regulatory authority of the Hawaii Insurance Commissioner ("Commissioner"). On June 22, 1994, the Commissioner petitioned the Circuit Court of the First Circuit of the State of Hawaii for seizure of IEL pursuant to HAW. REV. STAT. § 431:15-202 and for an order of rehabilitation pursuant to HAW. REV. STAT. § 431:15-301. An affidavit attached to the Commissioner's petition stated that, after a review of information provided through IEL or its auditors, it appeared to the Insurance Division that IEL was insolvent in the amount of $52 million. The circuit court entered a Seizure Order authorizing the Commissioner to take possession and control of all the assets of IEL. Appendix E. A Stipulated Rehabilitation Order (between the Commissioner and Petitioner), appointing the Commissioner as Rehabilitator of IEL, was entered two days later. Appendix G.

Following further review of IEL's financial condition, the Commissioner petitioned the circuit court on August 5, 1994, for liquidation of IEL. Appendix C-1. In his petition, the Commissioner asserted, among other reasons, that IEL was in such a condition that further transaction of business would be financially hazardous to its

policyholders, creditors, or the public; that the interests of policyholders, creditors or the public might be endangered by delays; and that the Commissioner believed that attempts to rehabilitate the insurer would be futile and/or would serve no useful purpose. Affidavits supporting the bases for liquidation were attached to the petition.

Hearings were held in the circuit court on the Commissioner's petition during August and September, 1994. Prior to the first hearing, Petitioner IELHC (IEL's sole shareholder) sought leave to intervene and present a proposed plan of rehabilitation which, it contended, would "eliminate completely" the insolvency of IEL through the contribution of certain assets by IELHC. Appendix C-6, ¶ 14. Notably, the Petitioner's proposed plan *did not dispute*, but in fact conceded, IEL's substantial insolvency. Appendix C-22, ¶ 27.

In addition to Petitioner, five directors of IEL appeared and filed a memorandum which opposed the petition for liquidation and requested a continuance in order to consider and discuss Petitioner's proposed rehabilitation plan. Appendix C-2. Like Petitioner, the IEL directors did not contest IEL's insolvency.

In accordance with a stipulation between Petitioner and the Commissioner (Appendix H), Petitioner was permitted to intervene in the case and to participate in the proceedings in the circuit court. The circuit court ultimately concluded, however, that under the statute controlling the proceedings, the Petitioner – unlike the directors, who were expressly granted standing (HAW. REV. STAT. § 431:15-305(a)) – did not have standing to

intervene in the proceedings to challenge the Commissioner's petition for liquidation. Appendix C-15, ¶ 10.

Petitioner's rehabilitation plan was reviewed by the Commissioner and by consultants retained by him to assess the plan's potential value and feasibility. Appendix C-7, ¶ 15. Based on that review, the Commissioner determined that the plan would not suffice to eliminate the insolvency. In its Findings and Conclusions, the circuit court laid out in detail the specific factors that led it to agree that the plan would not accomplish what Petitioner claimed. *See* Appendix C-6, ¶ 14, through C-10, ¶ 25. The court accordingly granted the Commissioner's petition for liquidation.[2] Appendix C-24, ¶ 3.

Petitioner appealed to the Hawaii Supreme Court, contending that there was insufficient evidence to support the circuit court's findings and conclusions, and that the circuit court's failure to provide a full evidentiary hearing was a denial of Petitioner's right to due process. Appendix A-3. The IEL Directors, who had a statutory right to object to liquidation and who had participated in the circuit court proceedings, did not appeal the circuit court's Order. The Hawaii Supreme Court did not reach

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[2] The circuit court also concluded that the parties had been afforded a full and fair opportunity to present their arguments and the factual bases therefor, and that the absence of a full evidentiary hearing "in no way affected the final outcome of the matters pending before this Court." Appendix C-22, ¶ 28, to C-23, ¶ 29.

the merits of Petitioner's contentions, because it concluded that Petitioner lacked standing to oppose the liquidation petition in the circuit court. Appendix A-5. Petitioner thereupon filed its Petition for a Writ of Certiorari in this Court.

SUMMARY OF ARGUMENT

This case presents no "important question of federal law" that warrants review by this Court. The decision below turns on interpretation of a state statute governing insurance company insolvencies – an area of significant concern to the State of Hawaii. In deciding whether Petitioner had standing to contest the liquidation of IEL, the Hawaii Supreme Court examined the relevant Hawaii statute and concluded that, consistent with the language and purpose of the statute, a shareholder such as Petitioner did not have standing to oppose the liquidation petition filed by the Commissioner. The Hawaii Supreme Court's decision in this regard is entirely consistent with cases from other jurisdictions on the same issue, and is in no way inconsistent with any decision of this Court.

Petitioner suggests that the Hawaii Supreme Court should have gone beyond the statutory analysis and undertaken a separate analysis of its claim of "constitutional standing," based on an alleged violation of its due process rights. In the circumstances presented here, no such inquiry was warranted. First, Petitioner's interest as a shareholder of an insolvent insurance company did not rise to the level of a property interest protected by the

Due Process Clause, especially when IEL's Directors could and did participate in the proceedings. Second, even assuming Petitioner had a protectable property interest at stake, Petitioner received all the "process" that was due it. Despite Petitioner's lack of standing, the circuit court allowed Petitioner to intervene and gave Petitioner the opportunity to present its proposed plan of rehabilitation. That Petitioner's plan was ultimately rejected following consideration by the Commissioner, his consultants, and by the circuit court does not raise any constitutional concerns.

There is accordingly no important question of federal law presented by this case and no need for any constitutional inquiry into Petitioner's standing in these proceedings. The Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. IN DECIDING WHETHER PETITIONER HAD STANDING, THE HAWAII SUPREME COURT PROPERLY FOCUSED ITS INQUIRY ON THE STATE STATUTORY SYSTEM GOVERNING THE PROCEEDINGS AT ISSUE, AND CORRECTLY DETERMINED THAT PETITIONER HAD NO STANDING UNDER STATE LAW TO OPPOSE THE LIQUIDATION PETITION.

Petitioner contends that the Hawaii Supreme Court's standing analysis was deficient because the court limited its focus to the state statute governing the proceedings at issue rather than addressing Petitioner's claim of standing based on an alleged violation of its due process

rights. Petition, p. 21. However, this disregards the fact that Petitioner sought to be heard in proceedings that are part of a detailed state statutory system governing insurance company insolvencies and judicial review thereof. In such circumstances, the Hawaii Supreme Court was entirely correct in focusing its inquiry on that statutory system. In *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972), this Court stated:

> Where . . . Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

Assuming a dispute is otherwise justiciable, the question whether a litigant is a "proper party to request an adjudication of a particular issue" is one within the power of the Congress (and, presumably, the Hawaii legislature) to determine. *Id.* These principles are particularly applicable where, as here, the proceeding in which standing is sought relates to regulation of insurance, a matter in which states have a vital interest.

Having properly focused on the state statutory system, the Hawaii Supreme Court correctly decided that the statute at issue did not afford standing to shareholders of an insolvent insurance company. Proceedings to liquidate IEL were brought pursuant to HAW. REV. STAT. Chapter 431, Article 15 (1993), the Insurers Supervision, Rehabilitation & Liquidation Act ("Article 15"). Appendix A-2. Examining relevant statutory language, the Hawaii

Supreme Court noted that Article 15 includes a provision (§ 431:15-104(c)) that no Hawaii court has jurisdiction to determine any complaint praying for relief relating to the liquidation or rehabilitation of an insurer *"other than in accordance with this article."* Appendix A-4. Further, Article 15 gives the Insurance Commissioner the sole discretion to prepare a rehabilitation plan *if* he determines that it is *appropriate* (§ 431:15-303(d)), and provides that "the court shall permit *the directors of the insurer* to take such actions as are reasonably necessary to defend against the petition" for an order of liquidation (§ 431:15-305(a)). *Id.* (Emphasis as in Hawaii Supreme Court opinion.)

The court also found it significant that the purpose of Article 15 is to protect the interests of insureds, claimants, creditors, and the public generally (§ 431:15-101(d)). Notably absent from the purpose of the statute is "the protection of *shareholders* of the insolvent insurance company." Appendix A-5 (citing *Hartnett v. Southern American Fire Ins. Co.*, 495 So. 2d 902, 903 (Fla. Dist. Ct. App. 1986)). Finally, section 431:15-101(c) provides that Article 15 "shall be liberally construed" to effect the stated purpose of the statute. *Id.*

The Hawaii Supreme Court accordingly held that it was consistent with the language and the purpose of Article 15 to conclude that Petitioner did not have standing to oppose the petition to liquidate IEL.[3] Although

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[3] As previously noted, the circuit court (which under § 431:15-307(d) has jurisdiction to make the necessary declarations in a proceeding to liquidate an insurance company "after providing such notice and hearing as it deems proper") approved a stipulation giving the Petitioner an opportunity to

Petitioner claims that the Hawaii Supreme Court should have gone on to consider Petitioner's asserted constitutional basis for standing (see discussion in Section II, below), Petitioner does not appear to take the position before this Court that the Hawaii Supreme Court's analysis of standing *under the statute* was incorrect. In fact, that court's opinion was not only correct, but was entirely consistent with the case law from other states that have addressed the issue under their analogous insurance statutes. In *Hartnett*, for example, the Florida District Court of Appeal – construing a statutory system similar to Hawaii's – held that majority shareholders of an insolvent insurance company did not have standing to contest claims filed in the receivership of the company. Like the Hawaii Supreme Court, the Florida court concluded that where protection of shareholders was not among the purposes of the statute, shareholders should not be deemed to have standing in proceedings brought under the statute. *Id.* at 903. *See also Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086 (Pa. 1992), *cert. denied*, 506

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participate in the proceedings before it, notwithstanding a subsequent express determination that Petitioner did not have standing to submit its own rehabilitation plan. Appendix C-16, ¶ 12 ("This Court concludes that, consistent with the foregoing, IELHC has no standing to submit a plan of rehabilitation to this Court. Notwithstanding this conclusion, IELHC has been afforded a full opportunity to present its position in this proceeding and its submissions have been considered, without regard to its lack of standing"). As the Hawaii Supreme Court correctly concluded, the circuit court did not somehow confer standing where standing did not otherwise exist under the statute, nor was the circuit court prevented from later determining that Petitioner did not have standing.

U.S. 1080 (1993), and *Kentucky Central Life Ins. Co. v. Stephens*, 897 S.W.2d 583 (Ky. 1995), discussed in Section II, below.

In light of the fact that the Hawaii Supreme Court's resolution of the standing issue under Hawaii's Insurers Supervision, Rehabilitation and Liquidation Act was in accordance with the express language of the statute and was consistent with precedent in other states, there is no compelling interest requiring this Court to review that determination.

II. THIS CASE DOES NOT INVOLVE A FEDERAL CONSTITUTIONAL ISSUE THAT WOULD AFFORD STANDING TO PETITIONER NOTWITHSTANDING THE STATUTE'S DENIAL OF STANDING.

It is doubtless true that a legislature cannot deny standing under a statute if such a denial would lead to the loss of constitutional rights by the affected party. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). This case, however, does not present such a situation. Although Petitioner claims that the state court's refusal to afford it standing precluded it from asserting its constitutional right not to be deprived of a property interest without due process of law (Petition, pp. 24-25), a careful examination of the alleged "due process" violation demonstrates that no constitutional considerations required the Hawaii Supreme Court to go beyond the statutory system at issue.

A. Petitioner Had No Property Interest That Warranted Protection Under the Due Process Clause.

The initial step in any due process inquiry is to determine whether the nature of the asserted interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment, such that due process applies. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). It is thus necessary to begin with an assessment of whether Petitioner's claimed property interest is the sort of interest protected under the Due Process Clause.

This Court has frequently observed that property interests are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law. *E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985); *Paul v. Davis*, 424 U.S. 693, 710 (1976) (liberty and property interests within the meaning of the Due Process Clause "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law"); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

As previously noted, in situations involving insolvent insurance companies, Hawaii state law affords little if any weight to the property rights of shareholders of the insolvent insurer, but instead makes these rights subordinate to the rights of those parties – "insureds, claimants, creditors, and the public" – whom the statute was intended to protect. § 431:15-101(d); *cf.* Appendix A-5. State courts from other jurisdictions have recognized the reality that rights of shareholders and others may need to be compromised to avoid greater harm to policyholders

and the public in insolvency situations. In *Foster, supra,* the Pennsylvania Supreme Court rejected an argument that a rehabilitation plan for an insolvent insurer impermissibly impaired the objectors' constitutional rights. It observed:

> [W]e must look to the broad powers afforded to the Commissioner granted in order to effectuate equitably the intent of the Rehabilitation statutes, *i.e.,* to minimize the harm to all affected parties. As such, she has a fiduciary duty to marshall and preserve all assets of the insolvent entity. Furthermore, the exigencies attendant to a major commercial insolvency and the goals of rehabilitation necessitate the reality that "individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public."

614 A.2d at 1094. The court also noted that the objectors to the plan were "members of a highly regulated industry and as such were well aware of the powers of a Rehabilitator." *Id.* at 1094 n.4. This statement could be applied with equal accuracy to the Petitioner in this case, which acquired its interest in IEL several years after the statutory regime at issue was in place.

In *Kentucky Central Life Ins. Co. v. Stephens, supra,* the Kentucky Supreme Court rejected claims by an insurer and its shareholders in an insurance liquidation proceeding that the trial court had approved an arbitrary taking of their property without affording them due process of law. Observing that property rights are created and defined by state law, the Kentucky Supreme Court concluded that no violation of the shareholders' substantive

or procedural due process rights had occurred. It reasoned:

> The [Kentucky] Insurance Code . . . prioritizes the order of distribution of claims from an insurer's estate in order of classification: administration costs; wages; lost and unearned premium claims; residual classification; claims based solely on judgments; interest on claims already paid; and miscellaneous subordinated claims. Appearing next to last in order are preferred ownership claims and at the bottom of the list are the proprietary claims, which include claims of shareholders or other owners.
>
> . . . The universal rule of stockholder liability is simply a function of the basic concept that stockholders are remaindermen and that their only interest is in the equity, only what is left over after all corporate obligations have been paid. . . . The business of insurance is affected with the public interest and Kentucky has an important and vital interest in the liquidation or reorganization of a troubled insurance business.

897 S.W. 2d at 590-91.

Similarly, in cases outside the insurance context, it is recognized that the property interest of a shareholder does not generally include standing to redress an injury to the corporation in which the shareholder holds stock. *See, e.g., Franchise Tax Board of California v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 336 (1990); *EMI Ltd. v. Bennett*, 738 F.2d 994, 997 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1984);

Paulson, Inc. v. Bromar, Inc., 775 F. Supp. 1329, 1339 (D. Haw. 1991). As one court has explained:

> A stockholder generally has standing to sue to vindicate the rights of the corporation only in a derivative capacity. Before being allowed to sue in a derivative capacity, a plaintiff stockholder must show that he is asserting the rights of the corporation because the corporation refuses to vindicate its own rights.

Bosley v. Baltimore County, Md., 804 F. Supp. 744, 751 (D. Md. 1992), *aff'd*, 986 F.2d 1412 (4th Cir. 1993) (*per curiam*).

The Hawaii statute governing insurance company insolvencies is consistent with these well-established principles of corporate law. Petitioner's "property interest" as a shareholder – if any – does not include standing to sue on behalf of IEL. That standing is reserved for the IEL directors, who are expressly authorized to defend against a petition for liquidation (HAW. REV. STAT. § 431:15-305(a)) and who in fact appeared in this matter. Petitioner, as the sole shareholder, had the right to vote on the members of the IEL board of directors or provide them with direction. What it did *not* have was standing to appear in those proceedings in its own right.

B. Even Assuming That There Was a Protectable Property Interest at Stake in This Case, Petitioner Received All the "Due Process" to Which It Was Entitled.

If it were determined that Petitioner had a property interest at stake that entitled it to protection under the Due Process Clause of the Fourteenth Amendment, it

would still be necessary to address the second prong of the due process analysis – namely, what process is due. *Morrissey*, 408 U.S. at 481. Petitioner asks the Court not to reach this issue (Petition, p. 23). However, the issue cannot be ignored, because it demonstrates the futility of Petitioner's attempt to obtain certiorari review in this case. *Even if* Petitioner had a protected property interest, the record reveals that Petitioner was afforded all the due process required under the circumstances to protect that interest.

This Court has held that due process is flexible, and calls for such procedural protections as the particular situation demands. *E.g., Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Not all situations calling for procedural safeguards call for the same kind of procedure. *Morrissey*, 408 U.S. at 481. The appropriate process due in a given situation requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal or administrative burdens that the additional procedures would entail. *Mathews*, 424 U.S. at 334-35.

Applying that analysis to the instant case demonstrates that Petitioner was not deprived of its rights to procedural due process. The dubious nature of the "property" interest at stake has already been discussed above. As to the remaining factors, the threat to the public and to policyholders, and the presence of exigent circumstances surrounding an insurance company insolvency,

give the State of Hawaii a significant interest in ensuring that there should be no unwarranted delays or hindrances in taking the steps needed to protect the public and the policyholders. Moreover, notwithstanding its interest in proceeding expeditiously, Hawaii has provided for judicial procedures to ensure that any private interests affected by the Commissioner's actions will be considered – thereby minimizing the "risk of an erroneous deprivation of such interests."

As set forth above, the statute gives the Commissioner the authority to petition the Court for an order of liquidation if he believes further attempts to rehabilitate the insurer would substantially increase the risk of loss to creditors, policyholders, or the public, or would be futile. HAW. REV. STAT. § 431:15-305(a). The Commissioner exercised that authority in petitioning for IEL's liquidation. The statute directs the circuit court to make the necessary declarations in a proceeding to liquidate an insurance company "after providing such notice and hearing *as it deems proper*." HAW. REV. STAT. § 431:15-307(d) (emphasis supplied). The circuit court followed that directive in this case.

The directors of the insurer are to be permitted to "take such actions as are reasonably necessary to defend against the petition." HAW. REV. STAT. § 431:15-305(a). The directors did so in this case, filing a memorandum in opposition to the petition for liquidation. (The Hawaii Supreme Court took note of the directors' participation and observed that Petitioner "does not assert that the board of directors . . . failed to protect their interests or any special aspect thereof." Appendix A-5, n.5.)

Petitioner was permitted to intervene in the circuit court proceedings by stipulation. Although the circuit court ultimately concluded that Petitioner had no standing to submit its plan of rehabilitation to the court under the statutory system at issue, it nevertheless afforded Petitioner an opportunity to present its position and to have its submissions considered. Appendix C-16, ¶ 12. The proposed plan was reviewed by the Commissioner and by consultants retained by him to assess its potential value and feasibility. Appendix C-7, ¶ 15. The circuit court explained the bases for the Commissioner's conclusion that the proposed rehabilitation plan would not satisfy IEL's deficit, regardless of whether the deficit was deemed to be $65 million or in excess of $90 million. Appendix C-7 to C-10. It also noted that Petitioner had failed to provide any factual support for its arguments by way of affidavits and exhibits. Appendix C-10, ¶ 26.

In its Findings and Conclusions, the circuit court carefully outlined the legal principles applicable to Petitioner's due process claim (Appendix, C-19 to C-20), considered Petitioner's arguments in favor of a full evidentiary hearing on the petition for liquidation, and concluded:

> 27. . . . [T]he record before this Court contains ample evidence in the form of affidavits to support the finding that IEL is insolvent and that further efforts to rehabilitate IEL would serve no useful purpose. Despite ample opportunity to submit countervailing affidavits on the issue of insolvency, none have been submitted. To the contrary, Intervenor IELHC's own affidavits and arguments concede IEL's substantial insolvency.

> Thus, this Court concludes that a full evidentiary hearing is neither necessary nor appropriate with respect to the present Petition for Liquidation, the IELHC Petition for Rehabilitation, or the request for a declaration of insolvency.
>
> 28. The parties herein have been afforded a full and fair opportunity to present any and all arguments and factual bases supporting or opposing the Petition for Liquidation and IELHC Petition for Rehabilitation, including the [Commissioner's] request for a declaration of insolvency.
>
> 29. To the extent that the parties to the Petition for Liquidation and/or IELHC Petition for Rehabilitation are deemed to have been entitled to a full evidentiary hearing on some or all of the matters herein, this Court concludes the absence of such a hearing is not prejudicial to the substantial rights of the parties, and in no way affected the final outcome of the matters pending before this Court.

Appendix C-22 to C-23.

In light of the fact that the circuit court afforded Petitioner a full and fair opportunity to make its position known and have its submissions considered, no further "due process" was required. Thus, even if Petitioner possessed a protected property interest and even if it should have been afforded "standing" to protect that interest, it was in fact given the full amount of due process that was called for under the circumstances.

CONCLUSION

This case is entirely inappropriate for certiorari review. Principles of law applicable to standing and to procedural due process are well established. There is nothing in the Hawaii Supreme Court opinion that is contrary to these well-established principles, or inconsistent with decisions of other courts that have addressed standing issues in similar circumstances. Nor does this case present any "important question of federal law" which must be resolved by this Court. Instead, the case presents a well-reasoned opinion by the highest court of Hawaii, going to interpretation of Hawaii state law in an area in which the State has a vital interest.

Respondents accordingly request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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